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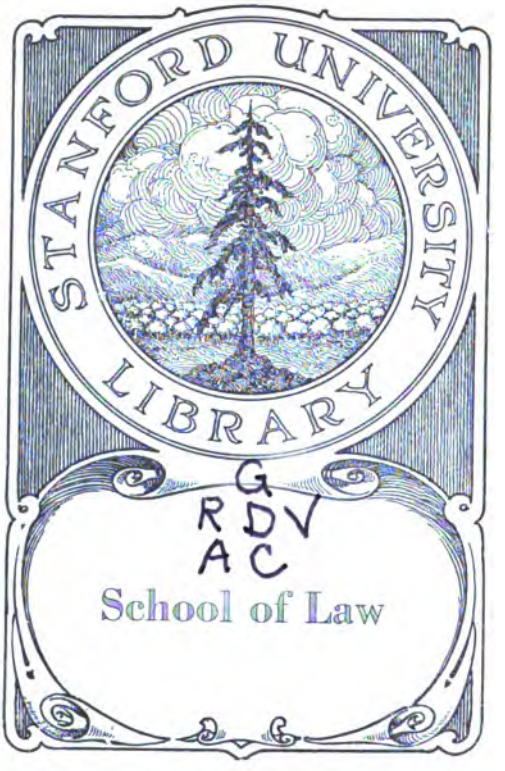
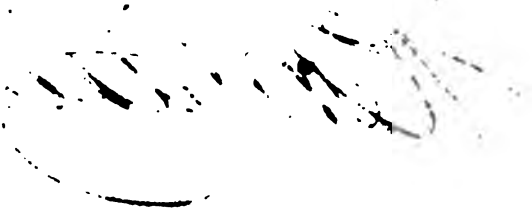
Nbr 2





Vermont. Supreme court.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

WITH

CASES OF PRACTICE

AND

RULES OF THE COURT.

COMMENCING WITH THE NINETEENTH CENTURY.

VOL. I.

TO BE CONTINUED.

BY ROYALL TYLER,
CHIEF JUDGE OF THE SUPREME COURT.

Hoc opus, hoc studium *parvi* properimus et ampli;
Si patriæ volumus, si nobis vivere cari.
Q. Hor. Flac. Epist.

NEW-YORK:
Printed and Published by I. Riley.

1809.

District of New-York, ss.

BE it remembered, That on the twenty-seventh day of October, in the thirty-fourth year of the Independence of the United States of America, ISAAC RILEY, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judi-
"cature of the State of Vermont. With Cases of Practice and Rules of the
"Court. Commencing with the nineteenth century. Vol. I. To be conti-
"nued. By Royall Tyler, Chief Judge of the Supreme Court. Hoc opus,
"hoc studium parvi properimus et ampli; Si patriæ volumus, si nobis vivere
"cari. Q. Hor. Flac. Epist."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, "charts, and books, to the authors and proprietors of such copies, during "the times therein mentioned;" and also to the act, entitled, "An act "supplementary to the act, entitled, an act for the encouragement of learn-"ing, by securing the copies of maps, charts and books, to the authors and "proprietors of such copies, during the times therein mentioned, and ex-"tending the benefits thereof to the arts of designing, engraving and etching "historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

To his Excellency the Governor; his Honour the Lieutenant-Governor; the Honourable Council; and the Honourable House of Representatives of the State of Vermont.

GENTLEMEN,

THE arduous business of framing laws for a numerous and free people, is yours.

To construe and apply the laws when enacted, to the concerns of your constituents, is the duty of the Judges of the Supreme Court of Judicature.

That you may know whether your intention as legislators has been pursued, and whether the laws you promulgate are beneficial in their effects, is of the highest importance.

To this intent, this volume of Cases, argued and decided in the Supreme Court of Judicature, is respectfully submitted to your consideration,

BY THE REPORTER.

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REGULA GENERALIS.

ORDERED by the Court—That no attorney of this Court shall enter bail in any process which is or shall be pending in the Court, or execute any gaol bond, except where personally interested.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JANUARY TERM, A. D. 1800.

ENOCH WOODBRIDGE, Chief Judge.
LOTT HALL, } *Assistant Judges.*
NOAH SMITH,

JOHN ADAMS *against* JACOB DAVIS.

ATTACHMENT. Plaintiff recognised for costs of prosecution on the original writ.

Plaintiff may enter himself as bail for costs of prosecution, on the original process in civil suits.

Vermont Stat. vol. 1. p. 71. s. 44.

Plea in abatement. That the plaintiff, under the statute, cannot enter himself as security for costs.

Judgment of Court. The writ does not abate. The defendant, upon the issuing the original writ, is entitled to such sufficient security for costs of prosecution, as is satisfactory to the authority signing such

Adams v. Davis.

Ib. s. 45.

process. If at any time while the suit is pending, he doubts the sufficiency of the bail to respond the costs, on motion the Court will order new bail, or direct a nonsuit.

STEPHEN PEARL, Sheriff, Appellant,
against
EBENEZER ALLEN, Appellee.

CASE. On a receipt for property attached on *mesne* process. General issue. Trial *per pais.*

The appellant offered a receipt in evidence, purporting to have been signed by the appellee, and offered to prove the execution of the receipt,

First. By comparison of hand-writings.

Secondly. By the concession of the party at the lower Court.

Objected, That the *subscribing witness* is within process of the Court, and ought to be produced.

Comparison of hands, or concession of a party on a former trial when not attached to the record, cannot be given in evidence while the subscribing witness to a contract is within process.

By the Court. Comparison of hand-writings cannot be admitted in evidence, or the concession of the party at the lower Court, whilst the subscribing witness resides within the process of the Court. The defendant must not in this way be deprived of cross-examining the subscribing witness to the contract. The concession of a party on a former trial, when not attached to the record, must be considered as a concession for that trial only.

Biddlecom v. Farwell.

RICHARD BIDDLECOM, *ex dem.* DANIEL BIDDLECOM, *against* JOHN FARWELL, Tenant in possession.

EJECTMENT. Common rule entered, and the general issue to the country.

Defendant offered to read in evidence a deed from *Nathan Spafford*, constable, and collector of the surveyor-general's tax, commonly so called, conveying the lands described in the declaration in fee to his ancestor, under a vendue sale for the non-payment of a tax.

Vermont Stat. vol. 2. p. 215.

Daniel Chipman, on the part of the plaintiffs, objected.

The act does not directly levy a tax, but only authorises the governor and council to assess a tax in either of two modes; the one on the soil, the other on the town as a corporation. In the present case it was assessed upon the town, and therefore ought to have been collected by a tax on the polls and rateable estate as directed by the subsequent explanatory clause of the act.

Decision under the surveyor-general's tax act.

Second objection. That this land was holden in severalty, and the constable is not made collector of taxes on such land.

By the Court. The constable's deed cannot be read in evidence.

Biddlecom v. Farwell.

HALL, Judge, observed, there was a more formidable objection. The whole original right is attempted to be conveyed by the deed.

Verdict for the plaintiff.

MARTIN HARMON, *ex dem.* SAMUEL FAY *et al. against* MOSES TAFT and SETH COGSWELL, Tenants.

The deed of a *feme covert* conveying land held in her own right, must be executed and acknowledged conformably to the *lex loci*, where the land lies.

EJECTMENT for a right of land in *Charlotte*, to wit, the original right of *John Southgate*.

Common rule entered. General issue joined and put to the Jury.

Plaintiff's evidence:

First. Copy of the charter of *Charlotte*, recorded in the proprietor's records, dated 24th *June*, 1762. *John Southgate*, an original grantee.

Secondly. Deed from *John Southgate* to *Sarah Southgate*, dated *July* 3d, 1762.

Thirdly. Deposition of *John Hopkins*, proving the intermarriage of *Sarah Southgate* with *Azariah Dickinson*.

Fourthly. A deed from *Azariah Dickinson* and *Sarah* his wife, late *Sarah Southgate*, to the lessor of the plaintiff, dated the 8th of *October*, 1773, and acknowledged by both in common form before a Justice of the Peace, *Hampshire* County, Commonwealth of *Massachusetts*.

Daniel Chipman, counsel for the tenants, objected to this last deed.

By common law, a *feme covert* cannot convey real estate, neither can her husband convey that which is held in the right of his wife.

The conveyance, to be legal, must be predicated upon statute. The plaintiff shews no statute either from *New-York*, *New-Hampshire*, or this State, authorising this mode.

HALL, Judge. By common law a *feme covert* can convey neither real or personal property. Before this deed can be read to the Jury, it must appear that there was some existing law authorising the conveyance of land by a *feme covert* in this mode, or that the acknowledgment of this deed is consonant with some statute of this State.

WOODBRIDGE, Chief Judge. The *lex loci* where the land is, ought to regulate the conveyance. At the time this deed was executed and acknowledged, this territory was under the jurisdiction of *New-York*, and the deed, to be operative, ought to have been executed and acknowledged agreeably to the existing laws of that then colony. The deed cannot be read to the Jury.

Plaintiff nonsuited.

NOTE. In this cause, after the rejection of the deed by the Court, it was moved to introduce it as a lease, conveying the life estate of the husband in the premises.

Harmon v. Taft and Cogswell.

Sed per Curiam. It cannot be read for that purpose. *Hesitante Hall.*

This decision has been since shaken.

SAMUEL YOUNG, Appellant,
against
JOSHUA SANDERS, Appellee.

ACTION on promissory note, dated 17th *February*, 1791, for the sum of *thirty dollars.* Writ returnable to *Chittenden* County Court, *September* term, 1796.

Vermont Stat. vol. 1. p. 169.

Plea to the jurisdiction. That a Justice of the Peace has *exclusive* jurisdiction of all civil causes to this amount.

In civil causes, where the demand is above 7 dols. and under 33 dols. in unliquidated, and 53 dols. in liquidated demands, County Courts and Justices of the Peace have concurrent jurisdiction.

By the Court. The County Courts hold *concurrent* jurisdiction with the Justices of the Peace, of all suits where the demand is above seven dollars, and where it does not exceed thirty-three dollars in unliquidated, and fifty-three dollars in liquidated demands.

Plea to the jurisdiction overruled.

On the 5th *November*, 1801, the General Assembly passed the following act:

Vermont Stat. vol. 1. p. 101. County Courts' jurisdiction not concurrent with Justices of the Peace.

"An act in addition to an act entitled, An act constituting the Supreme Court of Judicature and County Courts, defining their powers, and regulating judicial proceedings.

"Whereas it it is considered by some of the County Courts in this State, that they have *concurrent jurisdiction* with Justices of the Peace in civil actions, Therefore, it is hereby enacted by the General Assembly of the State of *Vermont*, that the several County Courts shall not hear, determine, or adjudge on any action or suit which is originally made cognisable before a Justice of the Peace, unless such action or suit shall be entered in such Court by appeal; any law, usage, or custom to the contrary notwithstanding."

Dimond's Ex'ors v. Allen.

Executors of THOMAS S. DIMOND

against

IRA ALLEN, Administrator of REMEMBER BAKER.

SCIRE FACIAS, to shew cause why execution should not issue *de bonis propriis*.

Demurrer by defendant.

Causes of demurrer:

In *scire facias* against administrator, to shew why execution should not issue *de bonis propriis*, it is not necessary to allege expressly that defendant is administrator, or that he has assets.

First. It is not alleged that said *Ira* was ever administrator on the intestate's estate.

Secondly. That the plaintiff in his declaration hath not alleged that there were assets in the hands of the supposed administrator.

The counsel for the demurrant doubted whether in any case an action of this nature would lie: but more especially relied on the second exception; and cited *Durnford & East*, vol. 7. p. 27. *Gill* v. *Scrivens*. *Lilly's Entries*, vol. 2. p. 627.

Counsel for the plaintiff. The law is so well established, that as to the action's being well founded, I shall be silent.

In reply to the first exception in demurrer. It is sufficient to name plaintiff or defendant as administrator, without expressly alleging him to be such. *Com. Dig.* vol. 5. p. 586.

To the second exception. It is established, that in every case the administrator is to be considered as having assets in his hands until shewn by him to the contrary in pleading. *Com. Dig.* vol. 5. p. 576. In declaration against administrator, it is not necessary to allege assets in his hands.

By the Court. A *scire facias* is a judicial writ, and the recital of the record on which it is founded is sufficient. If the defendant was not administrator, he should have shewn it in his defence in the original suit. If he has no assets, *plene administravit* will be good shewing in the present suit.

Declaration sufficient.

Daniel Chipman, for plaintiff.
Samuel Miller, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ADDISON COUNTY, JUNE ADJOURNED TERM,
A. D. 1800.

ENOCH WOODBRIDGE, *Chief Judge.*
LOTT HALL, *NOAH SMITH*, } *Assistant Judges.*

ELIAKIM CULVER *against* STEPHEN PEARL, Sheriff of Chittenden County.

An officer is empowered to set off one execution against another, between the same parties, and both in his hands at the same time.

PLAINTIFF complains, that by the consideration of the County Court of *Chittenden* County, he recovered judgment against *Abel Phelps* for the sum of 6*l.* 2*s.* lawful money, and prayed out his writ of execution in due form of law made returnable in sixty days from the date, and committed the same execution to the defendant, in his capacity of sheriff, to serve and return agreeably to law, but that said *Pearl*, contriving to injure, &c. neglected to return said execution, whereby, &c. *ad damnum.*

Second count. Plaintiff declares on the same judgment and execution, *aliter et idem*, delivered

as aforesaid, and that said *Pearl* made an undue and unlawful return on the same in the words and figures following, viz.

"Then by virtue of this writ of execution to me directed, I repaired to the usual place of abode of the debtor within named, and made demand of money, goods, or chattels to satisfy the same; and in satisfaction thereof the said debtor delivered to me a certain writ of execution to me directed, to serve and return in favour of the said debtor, and against the creditor within named, and one *Caleb Culver*, for the sum of 11*l.* 5*s.* 6*d.* lawful money, debt or damage, and 15*s.* 10*d.* costs, on a judgment rendered by *Timothy Pearl*, Esquire, one of the Justices of the Peace for said County of *Chittenden*, on the 6th day of *April*, A. D. 1795. Said writ of execution by the said Justice subscribed with his official signature, and dated the same 6th day of *April*, to indorse upon the same such sufficient sum as might be in full satisfaction of the within execution, and the legal costs thereon arising. Therefore, *in pursuance of law*, by an indorsement on the aforesaid execution in favour of the within named debtor of the sum of 6*l.* 2*s.* 6*d.* lawful money, in full satisfaction of the within writ of execution, I do return the same fully satisfied."

The general issue tendered and joined to the first count, and defendant demurred to the second.

By the Court. An officer has a right to off-set one execution against another between the same parties both in his hands at the same time. The plaintiff has allegated no cause of action in his second count, and the same is insufficient.

Culver v. Pearl.

By agreement of parties entered on the record, judgment on the demurrer to control the general issue.

Plaintiff nonsuited.

DOE, *ex dem.* ABRAHAM BALDWIN and ZALMON BOOTH, *against* P. FOOT *et al.* Tenants in Possession.

Sheriff having two writs of execution for and against the same parties, may extend upon the same parcel of land without specifying in his returns distinct boundaries.

EJECTMENT for lands in *Cornwall.*

The only point worthy note in this cause is, that plaintiff adduced in evidence two writs of execution of equal date, both in favour of *Baldwin* and *Booth*, against *Samuel Benton*, levied by *John Chipman*, Esquire, Sheriff of *Addison* County, upon the land in question *jointly*, i. e. the return of the officer on each is, " To satisfy this and one other writ of execution between the same parties, I have extended on and caused to be appraised according to law, certain lands butted and bounded," &c.

The question made is, whether the sheriff should not have levied each writ separately, and on several parcels of land, describing in each return distinct boundaries.

By the Court. The levy is correct.

DUDLEY HAMILTON, *qui tam, pro se* and the Treasurer of Essex,

against

HIEL WILLIAMS.

Vermont Stat. vol 2. p. 19. The record of a voluntary confession before a Justice, and payment of the whole penalty, may be pleaded in bar to an action *qui tam.*

ERROR. This writ was brought to reverse a judgment rendered on appeal by the County Court in a suit brought by the present plaintiff to recover the penalty for killing deer out of the statutable season, under the act to prevent the destruction of deer.

It appears, from inspection of the record, that the defendant *Williams* had, before the institution of the suit, complained of himself to Mr. Justice *Powell,* of *Westford,* who recorded his confession, and received the whole penalty for the use of the treasury of that town.

In the County Court the defendant pleaded the record and proceedings of the Justice's Court in bar. Upon demurrer to the plea in bar, the County Court rendered judgment in his favour. And now the error assigned is, that demurrer to the plea in bar was sufficient, and that the proceedings before the Justice do not amount to the plea of *autrefoits convict.*

Sed per Curiam. These voluntary confessions of breaches of the minor statutes in the criminal code are so generally considered by the people to be correct, that the Court are inclined to sanction them. It is true, that in breaches of the peace, in assault and battery for instance, the Court would hardly incline to screen an offender, who had committed per-

Hamilton v. Williams.

haps a violent battery, and by his own representation had induced the magistrate to impose a fine every way inadequate to the offence; but no such injustice can happen through the voluntary confession of a breach of a penal law, where the penalty is ascertained, and the offender cannot lessen it by misrepresentation.

Judgment of Court. There is no error. Let the judgment of the County Court be affirmed with additional costs.

REGULA GENERALIS.

ORDERED by the Court—That when the plaintiff in any writ of error shall become nonsuited, or shall neglect to enter and prosecute his suit, and the defendant shall become by law entitled, by complaint, petition, or motion, to enter for costs or damages; the defendant, on filing such petition, complaint or motion, shall pay to the Clerk of the Court one dollar for Clerk's fees, which may be taxed and allowed in his bill of costs.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JANUARY TERM, A. D. 1801.

PRESENT,

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

ASA BARNS, Appellee,
against
ISAAC WEBB, Appellant.

THIS was an action for slanderous words. Plea, not guilty.

The truth of words spoken, cannot be given in evidence under the general issue in an action for slanderous words.

Daniel Chipman and *S. Miller*, on the part of the defendant, offered evidence *to prove the truth of the words spoken in justification.*

Amos Marsh, for the plaintiff, objected to the admission of such evidence *under the general issue.* He contended that it must operate as a surprise upon the plaintiff; would bring on trial the conduct of his whole life, which no man of even the fairest character could be presumed to be prepared to defend *instan-*

Barns v. Webb.

ter; that the authorities on the subject are plenary and clear, and all shew that the Judges never permit the truth of the words to be given in evidence under the general issue, *in justification, or even in mitigation of damages;* but that it should always be pleaded, whereby the plaintiff might be prepared to defend himself; in support of which he cited *Morgan's Vade Mecum*, vol. 1. p. 151. *Esp. N. P.* vol. 2. p. 262. *Bac. Abr.* vol. 4. p. 518. *Com. Dig.* vol. 5. p. 220. *Str. Rep.* vol. 2. p. 1200. *Underwood* v. *Parks. Gilb. L. Ev.* vol. 2. p. 617. *Capel Loft's* edit. *Bull. N. P.* p. 9.

Chipman, for the defendant, conceded, that the *English* authorities were against the admission of the evidence; and by the *English* common law it is also settled, that a person indicted for publishing a libel cannot give in evidence the truth of the facts. But both these principles alike shew the genius of the *British* government, and the inapplicability of them to our own. In *England*, the characters of individuals, or at least certain individuals, must be protected *per fas aut nefas.* Our government has no such invidious sanction for its impure citizens. Here the truth will never be sacrificed to state policy; but the motto of the republican code will be, 'Great is the truth, and it shall prevail.'

Upon principles founded upon the very nature of the action, the evidence is admissible. The gist of the action of slander is malice; and can malice be implied if the words spoken are true? Certainly not. It is even an important duty we owe to society, to give the true characters of our fellow-citizens, particularly of the vitious and perpetrators of crimes, that

they may be guarded against. The evidence offered will shew, that the plaintiff has no cause of action.

As to the plaintiff's being surprised, and the admission of the evidence bringing on the trial of his whole life; we say, the action of defamation is not to be favoured, and every man ought to be taught, that if he would recover damages for an injury done to his character, by which we mean the estimation in which he has been held from his conduct in life, he must shew a character worth possessing. This principle, if established, would lead mankind to a greater degree of circumspection with respect to their conduct.

On the foregoing principles, we apprehend the practice has been settled in this State, although we can advert to no particular decision in point, as the reports of our judicial decisions are not printed; but we assert generally, that the practice has uniformly prevailed, has been acquiesced in by the bar, either from the precedent decisions of the bench, or from a general conviction that it is founded in principle.

It may be worth observing, that the Legislature of the *United States*, in their act commonly called the sedition act, adopted the principle of giving the truth of the slanderous or libellous words in evidence as a complete justification under the *general issue* in its fullest extent, even in cases of *scandalum magnatum*, of much greater import than words spoken to the injury of private persons.

Per Curiam. We do not wish to hear the counsel for the plaintiff. The authorities are clear and full upon this point. They are founded in reason, and

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ought not to be departed from. The evidence of the truth of the words proved to have been spoken by the defendant cannot be admitted under the general issue.

DANIEL KINNE, Appellant,
against
SAMUEL PLUMB, Appellee.

Samuel Miller and *Elnathan Keyes*, for appellee.
Daniel Chipman and *Wm. C. Harrington*, for appellant.

THIS was an action of *assumpsit*, brought by appeal from *Chittenden* County Court. At this term, *Miller* and *Keyes*, for the appellee, filed the following motion:

The County Courts are not empowered to compel a party under a general rule to appear and answer to a new declaration after the files have been lost.

Kinne, appellant, v. *Plumb*, appellee. } *Chittenden* County, Supreme Court of Judicature, *January* term, A. D. 1801.

THE said *Samuel Plumb* moves the Court here to dismiss the said action from the docket of the Court, for that it appears from the files, that said action was irregularly commenced before the County Court, in that the same declaration was, by an order of the said County Court, and without the consent of the said *Samuel Plumb*, filed in Court against him the said *Samuel Plumb*, without any service or notice

whatever; and that the said County Court ordered the said *Samuel's* attorney to appear and plead in said action, or to suffer a default thereon; whereby the said *Samuel* was compelled to appear and answer to said action to prevent judgment by default being rendered against him. And so the said *Samuel* says the County Court had no jurisdiction of said action. Wherefore the said *Samuel* prays a rule may be granted upon *W. C. Harrington*, Esquire, attorney to the said *Daniel Kinne*, to shew cause why the said action should not be dismissed, and that he may have his costs. By

Keyes and *Miller*.

It was admitted, that the declaration was filed in the County Court, under the following rule of said Court, and was conformable thereunto:

RULE OF THE COUNTY COURT.

Chittenden County Court, September Term, 1797.

In all causes where the files in any action in this Court are or shall be lost, the plaintiff's attorney shall have leave to file a new declaration, on affidavit, stating that he cannot find them with the Clerk of the Court, or learn where they are, and that the declaration which he moves for leave to file, does, to his best knowledge and belief, set forth the same cause of action, and in the same form as was set forth in the declaration so lost as aforesaid.

Smith, Judge, recited *memoriter* the decision of a case in this Court last term, *Bennington* County: *A.* entered an action against *B.* in *Bennington* County

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Court. After several imparlances, the files were missing under such circumstances as induced a belief that the defendant had eloigned them. The County Court made an especial rule, authorising the plaintiff to file a new declaration, which was done. Defendant refused to answer to it, and instructed his attorney to withdraw his appearance. The County Court rendered judgment by default. Defendant brought his writ of error. The whole proceedings of the County Court were certified up. The Supreme Court reversed the judgment rendered in the Court below, and it was the united opinion of the Judges of the Supreme Bench, that the County Court had no power to make such rule.

Chipman, for appellant, insisted, that the rule of the County Court, under which the plaintiff *Kinne* filed the declaration on the loss of the original files, was warranted and rendered valid by the statute, which authorises the Supreme and several County Courts to make all necessary rules for the orderly practice in their several Courts, provided that such rules be not repugnant to the constitution or laws of the State.

Vermont Stat. vol. 1. p. 60. s. 19.

This rule cannot be repugnant to either. True, the same statute directs by what process defendants shall be brought into Court, and how such process shall be served. In this case the statute was complied with, and the parties in Court; the files were then lost. This is a case not indeed contemplated by the statute, a *casus omissus*, and is well provided for by the rule of the County Court. But it is sufficient in this case for the plaintiff, that the filing of this declaration is warranted by the practice of the Courts of

Vermont Stat. vol. 1. p. 61. s. 24.

common law in *England*, which practice is surely not set aside by any statute of the State. On the contrary the whole body of the *English* common law is adopted *sub modo*, or with certain restrictions. In support of which practice, he cited *Lilly's Entries*, vol. 2. p. 522. *Clitheroe* v. *Franklin*. In this cause it appeared to the Court of C. B. upon affidavit, that the verdict was given for the tenant, and judgment thereon signed; but the *postea*, with the writ of *habeas corpora juratorum*, and the panel thereto annexed, was by misfortune lost. It was ordered that the like record should be engrossed, and that a *habeas corpora* be made anew and returned, and a verdict on the *postea* be returned by the associate of the Lord Chief Justice of the Court, and that judgment be entered thereon according to the verdict.

Vermont Stat. vol. 1. p. 51.

He also cited *Str. Rep.* vol. 1. p. 141. edit. 1781. *King, qui tam*, v. *Bolton*.

The defendant having brought error in Parliament, the record was transcribed, and, as it was carrying to the House of Lords, the original was picked out of the officer's pocket. The House of Lords received the transcript without examining it, and the Court of B. R. ordered a new entry to be made, and the judgment of the King's Bench was affirmed in Parliament.

Mr. *Chipman* further observed, that the decision of the Supreme Court, cited by the Assistant Judge, he humbly conceived was not in point, as that decision was grounded upon an especial rule, apparently made to apply to a particular case; but because the County Court had no power to make such especial rule, *non constat* they may not make general rules for the orderly practice of their Court, as provided by

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the statute. Indeed the statute provides merely for general rules.

S. Miller, for the appellee. The statute directs that the declaration shall be sent out with the writ; that service shall be made in all cases twelve days before the sitting of the Court to which it is made returnable. These requisitions of the statute must be complied with, or the judgment will be erroneous; or rather, all the subsequent proceedings will be irregular and void. That these requisites have been complied with, can be shewn by matter of record only. In this case, it cannot appear that these statute requisitions have been complied with. What then is the operation of the process in the County Court? Plainly this: To compel a defendant to answer to a declaration filed against him in Court without any previous preparation or notice. This is directly repugnant to the statute, which requires that the defendant shall have twelve days notice of the declaration before the sitting of the Court. The rule of Court, then, on which the proceedings are founded, must be void, and of course all the proceedings grounded upon the rule.

The decisions cited from the authorities were founded on the *English* statutes of jeofails, which are broader than ours; of course those decisions can have no weight. Besides, if the rule of the County Court be repugnant to the laws of the State, it must be void. In this view of the subject we have only to compare the rule with the statute. The repugnancy is manifest.

To notice more particularly the cases cited from the *English* books. We observe, that the cause of

King, qui tam, v. *Bolton,* was in prohibition. In that cause it appears, that after the plaintiff had declared in prohibition, judgment against him, and writ of error brought by him in Parliament, in carrying up to the House of Lords a transcript, together with the original record, the latter was picked from the pocket of the clerk; the transcript was read in Parliament without examination and comparison with the original, as is the practice in such cases; the Lords proceeded, and affirmed the judgment. After a final judgment and decision of the cause, on the writ of error application was made to the Court of King's Bench to file the proceedings *de novo* to support the judgment; and by statute the Judges in *England* are empowered to amend in support of judgments; but in the construction of this and all other statutes of jeofail, they never create, and have ever some written document to *amend by.* In this case there was the copy or transcript of the process to *amend by.* Thus, by our practice, should the copies brought into this Court by appeal be lost, this Court would allow them to be supplied by a new transcript. The files and records of the County Court would remain to *amend by.*

In the case of *Clithero* v. *Franklin,* where the *habeas corpora* verdict and *postea* were lost, there was the writ, declaration and process still left. There was the Judges' notes to *amend by,* as well as the oath of the Clerk. The *habeas corpora* is to be compared to our *venire;* the verdict, as with us. Should our Clerk neglect to enter the verdict, or lose it when returned on paper as in civil causes, it might at any time before the ending of the term, be supplied from after recollection; yet the writ and process could

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never be thus supplied. There is this principle in both cases cited; there was something to amend by. In the present case, there was nothing to supply the loss of the files but a partial amendment, supplying merely the declaration without *mesne* process, bail, or subsequent pleadings, and that declaration supplied from the mere recollection, and supported by the affidavit of the attorney to one party, and forced upon the other party.

The Chief Judge delivered the opinion of the Court.

The County Court were not authorised to make such rule. The statute points out the mode of issuing and serving process. This is a case unprovided for by law. A practice under such rule, which authorises the plaintiff's attorney to file such declaration, would open a door for contest. Considering this cause as irregularly before the County Court, they having no jurisdiction, this Court have not the cause regularly before them, and therefore it must be dismissed.

Rule made absolute.

Miller then moved the Court for costs, agreeably to his motion filed. He argued, that the proceedings under the rule in the County Court were compulsory; that the irregularity of these proceedings was the fault of the original plaintiff, and not the laches of the defendant; that this is similar to a case on a judgment in favour of a plea in abatement to the jurisdiction of a Court where costs are taxed;

that the plaintiff ought not to allege the irregularity of his own process as an excuse for the payment of costs.

The Chief Judge mentioned a cause before this Court, decided in *Windsor* County, where an appeal was taken from an order of amendment in the County Court. The Court decided against the appeal. On the motion for costs, the Court referred the appellee to the bonds given below to prosecute the appeal to effect.

The Court took time to advise; and now, on the tenth day of the term,

The Chief Judge delivered the opinion of the Court.

This case is distinguishable from a plea to the jurisdiction, as in that case there is original process; in the present case no original process upon which costs can be predicated.

The cause is dismissed without costs.

NOTE. By an act of the Legislature, passed *November* 10th, A. D. 1807, provision is made to supply the deficiency of files "lost, mislaid, or destroyed." *Vid. Vermont* Stat. vol. 1. p. 114.

Fitch v. Stanton.

JABEZ G. FITCH *against* JOSHUA STANTON.

IN ERROR. Plaintiff in error nonsuited.

S. Miller, for defendant in error. *The plaintiff below* moved the Court that he might tax in the bill of costs, now recovered by defendant in error, an item containing the officer's fees for the return of the original execution; which writ of execution had been superseded by the writ of error. He read the 8th section of the act entitled, An act constituting the Supreme Court of Judicature, &c. "And the Supreme Court of Judicature shall have power to examine, reverse, or affirm any judgment in civil actions rendered in any County Court upon a writ of error; which writ of error any Judge of the Supreme Court shall have power to allow and sign, and, on allowance of such writ of error as aforesaid, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all *damages and costs*. If he fail to make his plea good, and if, on such writ of error, the former judgment shall be affirmed, the Court shall adjudge to the defendant or defendants in error, just damages for the delay occasioned by such writ, and single or double costs, at their discretion."

Vermont Stat. vol. 1. p. 57.

He also read a clause from the fee bill, regulating the fees for sheriffs, &c. returning writs of execution. He argued, that this item for officers' fees for returning a superseded execution, although not strictly within the letter, came fully within the spirit of the law; that the manifest intention of the Legislature

Vermont Stat. vol. 1. p. 387.

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was to give all real damages, and something as smart money, to the defendant in error, to prevent delay in the collection of debts; that, allowing this item to be unprovided for by the statute, yet an officer having an execution in his hands unlevied, and the same being superseded by a writ of error, it became his duty to return the writ to the Court from whence it issued, with his reasons for not levying the same indorsed; for until the execution be returned, the plaintiff below can obtain no *alias*, which might issue upon the affirmation of judgment, or nonsuit of the plaintiff in error. It has likewise been decided, that the officer is liable to an action for neglecting to return such execution; therefore if the officer is in fact placed in this situation by the writ of error, that he is compelled to return the execution, and there is no other mode pointed out by the statute for him to obtain his fees for such service, the Court will be inclined to allow them under their discretionary power.

An officer cannot charge fees for return of execution stayed by *supersedeas* in writ of error.

By the Court. The fee bill does not empower the officer to charge such fees to the original plaintiff; and if he is not liable to pay the officer's fees, he cannot claim them of the defendant, or ought they to be included in the damages. The item for officer's fees for return of the writ of execution issued from the Court, cannot be taxed.

Boynton v. King and Barnard.

JOB BOYNTON, Appellee,

against

GIDEON KING and ELI BARNARD, Appellants.

It is a general rule, that travel and attendance shall be taxed for all defendants in ejectment.

EJECTMENT. Verdict, defendants not guilty.

Amos Marsh, for the defendants.

In this cause the opinion of the Court was required. Shall travel and attendance be taxed for each of the defendants?

By the Court. It is a general rule, that travel and attendance shall be separately taxed for all the defendants in ejectment, unless some especial cause be shewn to the contrary.

SAMUEL MIX *against* JOEL WHITLOCK.

Elnathan Keyes and *Daniel Chipman*, for plaintiff.
Wm. C. Harrington, for defendant.

The *rate-bill* necessary to be produced to maintain a title under the 30,000 dollars tax act.

THIS was an action of ejectment brought to recover the possession of Lot No. 75, on the *South Hero*, drawn to the right of *James Hopkins*, an original grantee under the charter made by the government of the State.

The cause went to the Jury under the general issue.

Keyes stated, that in support of the plaintiff's title he should rely upon the proceedings and deed of the constable, *ex officio* collector of *South Hero*, who had legally granted the lands described in the declaration to the plaintiff's ancestor, under the authority of an act passed *November* 3d, A. D. 1791, entitled, "An act for the purpose of raising thirty thousand dollars."

Vermont Stat. vol. 2. p. 237.

He then read a charter issued by the Governor of the State, conformable to law, dated 27th *October*, 1779, granting the islands in Lake *Champlain*, called the *Two Heroes*, to certain associates, among whom the name of *James Hopkins* was inserted.

He then offered in evidence a deed executed by *Isaac Adams*, constable and collector of *South Hero*, conveying the first division of the original right of *James Hopkins*, original grantee in *South Hero*, to *Charles Lafflin*.

Harrington, for the defendant, objected to this deed being read in evidence, as the grantor had not in the deed either recited his proceedings at large, or set forth that he had in all things pursued the directions of the statute.

E. Keyes, for plaintiff, admitted this to be necessary, unless he could shew the requisite proceedings from the doings of the constable. He then read a warrant in usual form from the Treasurer of the State, directed to the constable of *South Hero*, commanding him to collect a tax of one halfpenny on each acre of land in *South Hero*, pursuant to the statute above

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mentioned, and was proceeding to read in evidence certain public newspapers to prove the publication of the tax agreeably to the requirement of the act.

Harrington, for the defendant, contended, that previous to the reading these publications to the Jury, it was incumbent upon the plaintiff to exhibit the rate-bill required by the act to be made out by the selectmen, and delivered to the constable as collector. He read part of the first section of the act, which enacts,

" That upon receipt of the Treasurer of the State's warrant, the constables shall give notice to the selectmen of their respective towns, who shall on or before the first day of *March*, 1793, make out and deliver to such constable *a rate-bill*, containing a list of all the lands in such town held in severalty, and the number of acres contained in each lot, and the range in which it lies, or the division to which it was drawn or pitched, and the tax to be paid on the same; and where there are undivided lands in such towns, the said selectmen shall, under their oath of office, make an estimate of the quantity of land so undivided to the best of their judgment, which, together with all other lands in such towns, they shall form into one general list, and return an attested copy thereof on or before the first day of *November (then)* next following to the Treasurer of the State; and the selectmen shall assess each landholder or proprietor for the quantity which they respectively own, both divided and undivided, in one sum annexed to their names respectively; and when any land-owner or proprietor shall pay his proportion of said tax, it shall be the duty of said constable to make an indorsement on his

rate-bill, of the name of the person so paying the tax, and their lands shall thereupon be discharged therefrom; and if the sum assessed shall not be paid on or before the first day of *September*, 1793, such constable shall give notice by advertisement in all the newspapers printed in this State," &c.

Daniel Chipman, for the plaintiff, insisted that it was not necessary to produce the *rate-bill* as any part of the evidence to support the plaintiff's title. The warrant from the State Treasurer was in itself the sole and complete commission for the proceedings of the constable, in which no direction was given to the constable to apply to the selectmen for such *rate-bill*. He conceded that it was the selectmen's duty to assess, and that they might be indicted for nonfeasance; yet if such assessment or rate-bill was not made, it would not defeat the plaintiff's title, as the object of such assessment was not the benefit of the landholder or proprietor, but merely the convenience of the constable or collector, pointing out the portions or divisions in which he might vend the land. He argued, that if the Legislature had contemplated the assessment or rate-bill as constituting any link in the chain of title to lands vended under the act, they would have directed it to be recorded in some public deposit, to which the feoffee of the land under the vendue might at all times have had access.

Harrington, for the defendant, in reply, contended, that when a common law right is defeated by statute operation, such statute ought to be pursued strictly; that though it might be true that the Treasurer's

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warrant did not direct the constable to apply to the selectmen for the rate-bill, yet the same warrant referred to the act, was itself a creature of the act, and in connection with it constituted the constable's power to vend the lands of delinquents; that by the act the constable's application to the selectmen for a rate-bill became so necessary, that he could not proceed in his duty without it; that the assessment and rate-bill were equally a convenience to the land-holder or proprietor as to the constable or collector, furnishing an indisputable statement of what the former had to pay and the latter to collect; that there is no deposit of record, for the rate-bill provided by the act is correct; but it is not more necessary to record the rate-bill than the proceedings of the vendue, which it is undoubtedly necessary to produce in support of the plaintiff's title; but it appears there is a provision made in the statute, that the selectmen should forward an attested copy of the assessment and rate-bill to the Treasurer of the State, which might be resorted to in cases of exigency.

By the Court. The rate-bill must be produced in evidence. It constitutes in this case an essential part of the plaintiff's title.

Keyes then moved for a continuance of the cause, alleging, that the plaintiff had subpœnaed the constable with a *duces tecum*, commanding him to bring with him his proceedings under the act; that the constable was present, but had unfortunately omitted to bring the rate-bill, and it operated a surprise upon his client.

By the Court. Let the cause be continued. And the Clerk make a docket minute, that the plaintiff tax no costs for the present term.

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ASA PORTER *against* JOHN RUSSELL and LEONARD HODGES, Trustees of SAMUEL GOTT.

PLAINTIFF nonsuited.

Wm. C. Harrington, attorney to the Trustees, now moved, that the travel and attendance of each of the Trustees should be taxed.

Where several trustees personally attend, separate travel and attendance may be taxed.

By the Court. If both Trustees personally attended, let the travel and attendance of each be taxed.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ADDISON COUNTY, JANUARY TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
LOTT HALL, } *Assistant Judges.*
NOAH SMITH, }

STATE *against* J. N. B.

A woman divorced *a vinculo matrimonii* is a competent witness upon an indictment against her former baron for a forgery committed during coverture.

INDICTMENT for forgery. Defendant arraigned. Plea, not guilty. Trial by the country.

Daniel Chipman, Esquire, State Attorney, in support of the indictment, offered to adduce as a witness, Mrs. *W.* formerly wife to the prisoner at the bar, who had been legally divorced *a vinculo matrimonii*, and afterwards intermarried with *D. W.* to prove the forgery said to have been committed during the coverture of her former husband.

S. Miller, Esquire, counsel for the prisoner, objected to the competency of the witness. There is

no law better established, and more generally known, than that husband and wife cannot be witnesses for or against each other; the principle of this law is also well known, and universally approved—even the preservation of family peace. The only question which can arise is, does a separation by divorce give a competency to either husband or wife to testify against each other concerning any event which happened during coverture? Admitting the affirmative to be law would be as fatally destructive to family concord as to permit either of the conjugal parties to testify against the other during coverture. The language of inspiration is, "They shall be one flesh." The language of the law, they shall have one inseparable interest; and it is essential to connubial quiet, that married pairs should be impressed with the opinion, that at no future period of their lives this interest can be severed. If a man should have an adulterous wife, and apply for a divorce, must he anticipate, that in addition to the mortification and disgrace of breaking up his family, he is to be exposed to the vindictive testimony of a bad woman, who perhaps, incited by her seducer, might brand as criminal the most innocent of his actions during coverture?

A divorce *a vinculo matrimonii*, it is true, severs the interest of the married. So does a divorce *e mensa et thoro;* yet the books are full, that a wife under such circumstances cannot be admitted to testify against her husband. Death operates a fatal divorce: but a widow cannot be admitted as a witness to prove the illegitimacy of a child born during coverture.

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Mr. Attorney rose to reply, but was interrupted by the Court.

There is no legal disability in the witness. Let her be sworn. You may argue against her *credibility* to the Jury.

JOHN DOE, *ex dem.* JAMES FORBES, Appellee,
against
PHILIP SMITH and SOLOMON BARNUM, Tenants, Appellants.

Decision under the act establishing the division of lands in the town of *Shoreham.*

EJECTMENT. This was an action of ejectment brought to recover the possession of Lot No. 31, in the third division of lots in *Shoreham*, laid to the original right of *James Forbes*, junior. Common rule entered. Lease, entry, and *ouster* confessed, and the cause put to the country on the trial of the title under the general issue.

S. Storrs, for the plaintiff, in support of the title of the lessor of the plaintiff, read the charter of *Shoreham*, dated 9th *October*, 1761, by which it appeared, that *James Forbes*, junior, was indorsed as original grantee.

2dly. A deed executed by *James Forbes*, junior, to *Isaac Leach*, conveying the premises in fee, dated 12th *October*, 1761.

3dly. A deed from *Isaac Leach* to the lessor of the plaintiff, dated *May* 23d, 1787.

He then moved to introduce certain records of the proprietors of *Shoreham*, to shew that the land described in the declaration was severed to *James Leach*, junior. He stated, that the doings of the proprietors, as exhibited by their records, were not in pursuance of the then existing statutes. To remedy this defect, he moved to read the following act, and to introduce the defective records under the provisions of it:

Passed *Nov.* 7, A. D. 1800.

" An act establishing the division of lands in the town of *Shoreham*.

" Whereas the proprietors of the town of *Shoreham* have formerly, in proprietors' meetings, voted several divisions of the lands in said town into severalty, and the proprietors and land-owners in said town have made large improvements under said divisions, and do now hold all their lands and improvements by virtue of the same; and whereas, through some inaccuracies in the proceedings in making said divisions, or in the proprietors' Clerk in making records of the same, disputes *may arise* respecting the illegality of the divisions pitched and laid out in said town:

" Therefore it is hereby enacted, &c. that the several divisions of land in said town, whether laid by draft or pitches, or in any other manner heretofore agreed upon and pursued by the proprietors in their meetings, shall be considered good and valid in law. *Any person or persons concerned in the trial for any lands in said town, are hereby empowered* to give the records of the divisions of said lands in evidence, the same as though they had been made in a legal manner, any law, usage, or custom to the contrary notwithstanding."

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Daniel Chipman, for appellants, objected to this act going in support of the defective records on two grounds:

First. That the act was in itself unconstitutional, and therefore void; being manifestly repugnant to that restrictive clause in the constitution which declares, that the General Assembly shall pass no laws which shall have a retrospective view.

Secondly. That it is incumbent in the plaintiff to make out a good title in his lessor at the time of the commencement of his suit. It appears by the files, that the present action was instituted at the *September* term of the County Court, 1793; that this act having passed since, if it has any operation upon this suit, it must be retroactive, confirming a title which was defective at the time of the institution of the suit.

S. Miller, for the appellee, insisted, that the act was constitutional; that almost every legislative act might in one view be considered as retrospective, as almost every act operated more or less upon past contracts and proceedings. He instanced the act for quieting possessions, commonly called the quieting act. This act had passed some years since, had been generally acquiesced in by the people, sanctioned by the decisions of the State Courts, and of those of the *United States*, and had not been censured as unconstitutional by several councils of censors; and yet that act was flagrantly retrospective, doing away trespasses on the freehold, and giving the trespassers a right; that this present act may be compared to a statute declaring the mode of taking testimony after

the commencement of an action. This would be in one view retrospective, but surely not repugnant to the constitution. As to the inapplicability of the act to the present cause, he observed, that the situation of the landholders in the town of *Shoreham* called loudly for legislative interference; that the appellants, being strangers, ought to be estopped from disputing the proceedings of the proprietors to obtain the peaceable enjoyment and possession of their own lands; that the dispute in this as in every other cause which hath or may arise on these defective records, must be considered as existing from the origin of these records; and if the act cannot in this case confirm the records so far as to authorise us to read them in evidence, it cannot, in any action hereafter to be commenced; and so the act cannot have operation, which would be an absurd and inadmissible construction.

Chief Judge. It is contended by the appellant's counsel, that this act is unconstitutional. The Court have had several acts of this kind under consideration, and have ever considered them constitutional.

It is further contended, that the act does not reach the present case. It appears, that the proprietors of the town of *Shoreham* made certain divisions of their lands, in which, for a length of time, and indeed to the present day, they have acquiesced; but they found, by after inspection, that the records of their proceedings were not pursuant to the existing statutes, uniformly agreeing in the propriety, although not in the legality of such divisions; they sought legislative aid, and this act was passed. The act is remedial, and ought so to be construed as to give the

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remedy intended. The act does not declare that the records may be given in evidence in any action "*hereafter*" to be commenced, although the preamble of the act mentions any disputes which *may arise*, yet the enacting clause manifestly contemplates actions "*pending*," "*any persons concerned in the trial of any lands*," &c.

Let the act and the records of the proprietors be read to the Jury.

HALL and SMITH, Judges, concurred.

Verdict for plaintiff.

S. Miller, for appellee.
Daniel Chipman, for appellants.

BENJAMIN SUMNER, Reviewer,
against
MARTHA WENTWORTH, Reviewee.

The deed of a *feme covert* executed jointly with her baron must be acknowledged conformably with the statute of this State, or certified agreeably to the laws of the country where it is executed; and if not, the covenants in such deed are not binding on the *feme* after the decease of her baron.

COVENANT broken. Attach *Martha Wentworth*, of *Portsmouth*, County of *Rockingham* and State of *New-Hampshire*, to answer unto *Benjamin Sumner*, of *Clairmont*, in the County of *Cheshire* and same State, in a plea of covenant broken, wherein the said *Benjamin* declares, that at *Portsmouth* aforesaid, on the first day of *October*, 1781, the said *Martha*, together with *Michael Wentworth*, then of said *Portsmouth*, since deceased, the then

lawful wedded husband of the said *Martha*, by their certain deed, commonly called a deed-poll, in writing under the hands and seals of them the said *Michael* and *Martha*, by them well executed and authenticated according to law, bearing date the day and year last aforesaid, for and in consideration of the sum of one hundred and forty pounds, the then current money of the State of *New-Hampshire*, equal to 466 dols. 67 cts. of the current money of the *United States*, paid to them the said *Michael* and *Martha*, did, in the life-time of the said *Michael*, and while the said *Martha* was a *feme covert*, and the lawful wife of the said *Michael*, in the right of her the said *Martha*, grant, bargain, sell, aliene, release, convey and confirm unto the said *Benjamin Sumner*, his heirs and assigns, to have and to hold in fee-simple a certain tract or parcel of land in *New-Haven*, in the County of *Addison* and State of *Vermont*, containing five hundred acres, being the same land severed, laid out, and reserved to the right of the late Governor of *New-Hampshire*, *Benning Wentworth*, Esquire, deceased, as original grantee in said township; which land now lies in the City of *Vergennes*, in said County of *Addison*. And for that the said *Martha*, in and by said deed, covenanted to and with the said *Benjamin Sumner* to warrant and defend the said granted and bargained premises against all claims of any person claiming, meaning and intending claiming the said premises, by, from or under them the said *Michael* and *Martha*, or the said *Benning Wentworth*. And now the said *Benjamin Sumner* in fact saith, that since the execution and delivery of said deed, he hath been ousted, ejected, and expelled from the said granted premises by a person claiming

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the said granted premises by, from and under the said *Benning Wentworth*. Wherefore the said *Martha* hath not kept her said covenant, although often thereunto requested, but hath altogether broken the same, *ad damnum*, 10,000 dollars.

This action was originally entered at the County Court, *Addison* County, *September* term, A. D. 1797, and was continued, by agreement of parties, to *March* term, A. D. 1798; when

S. Miller, for the defendant, moved the Court, that the defendant might remove the suit for trial into the Circuit Court of the *United States*, to be holden at *Windsor*, within and for the District of *Vermont*, on the first *Monday* of *May*, A. D. 1798, according to the statute law of the *United States*, entitled, " An act to establish the Judicial Courts of the *United States*;" and offered bail, &c. pursuant to such statute. Whereupon the County Court decided, that the defendant take nothing by her motion.

Laws of *U. S.* vol. 11. p. 56.

And now the said *Martha*, in said County Court, by *S. Miller*, her attorney, comes and defends, &c. and pleads and craves *oyer* of the deed declared upon, which is read to her in the words and figures following, to wit:

Know all men by these presents, That we, *Michael Wentworth*, of *Portsmouth*, County of *Rockingham* and State of *New-Hampshire*, Esquire, and *Martha* his wife, in her right, for and in consideration of one hundred and forty pounds to us in hand paid before the delivery hereof, by *Benjamin Sumner*, of *Clair-*

mont, in the County of *Cheshire*, gentleman, the receipt whereof we do hereby acknowledge, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release, aliene, convey and confirm to him the said *Benjamin Sumner*, his heirs and assigns for ever, a tract of land in *New-Haven*, in the State of *Vermont*, containing five hundred acres, being the same land laid out to the right of the late Governor *Benning Wentworth*, Esquire, deceased, as original grantee in said township, in the County of *Rutland*.* To have and to hold the said granted and bargained premises, with the appurtenances thereof, to him the said *Benjamin Sumner*, his heirs and assigns, to his and their proper use, benefit and behoof for ever, hereby engaging to warrant and defend the said granted premises against all claims and demands of any person or persons claiming from, by or under us or the said *Benning Wentworth*.

In witness whereof we have hereunto set our hands and seals this first day of *October*, A. D. 1781.

Michael Wentworth. (L. S.)
Martha Wentworth. (L. S.)

Signed, sealed and delivered
in presence of

George Gains.
John Gilmore.

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* At the time of the execution of this deed, the township of *New-Haven* was within the jurisdiction of *Rutland* County.

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State of *New-Hampshire.*

Rockingham, ss. *Portsmouth*, *December* 9th, 1784. Then *Michael Wentworth* and *Martha Wentworth* his wife personally appeared before me, and acknowledged the above instrument by them subscribed to, as their free act and deed.

George Gain, Just. Pacis.

Which said deed being read and heard, she the said *Martha* the defendant pleads and says, that the plaintiff's declaration and matters therein contained, are not sufficient in law for the said *Benjamin Sumner* to have and maintain his said action thereof against her the said *Martha*, and that she hath no need, nor is she bound by the law of the land in any manner to answer the same, and this she is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said *Martha* prays judgment if the said *Benjamin* ought to have and maintain his action thereof against her, and that she may have her costs.

By *Miller*.

And the said *Benjamin Sumner* saith, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, as founded and counted upon the deed here exhibited in *oyer*, are sufficient in law for him the said *Benjamin* to have and maintain his aforesaid action against her the said *Martha*. Which said declaration, and the matters therein contained, in matter and form as the same are above stated and set forth, he the said *Benjamin Sumner* is ready to verify and prove, as the Court here shall direct and award.

Wherefore, inasmuch as the said *Martha Wentworth* hath not denied the said declaration, nor hitherto in any manner answered the same, or the matters therein contained, he the said *Benjamin* prays judgment, and the damages by him sustained on occasion of the breach of the covenant in said declaration mentioned, to be adjudged to him, and for his costs.

By *Darius* and *Daniel Chipman*,
and *A. Marsh.*

The County Court continued the cause to advise; and at their *April* adjourned term, A. D. 1798, adjudged, that the declaration is sufficient, and that plaintiff recover of defendant 929 dols. 78 cts. damages, and his costs.

From this judgment plaintiff appealed to the Supreme Court.

At the Supreme Court, after imparlance, the defendant *Martha Wentworth* filed the following plea and notice:

Addison County, Supreme Court of Judicature,
January term, A. D. 1800.

Benjamin Sumner, appellee,
v.
Martha Wentworth, appellant.

Take notice, that the counsel for *Martha Wentworth*, in the cause of *Benjamin Sumner* against her now pending in this Court, will, by leave of Court

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first had and obtained, waive their former pleas in said cause, and shall rely on the following, and the notice thereto subjoined.

Miller and *C. Smith.*

To *Daniel Chipman et al.*
Counsel for *Benjamin Sumner.*

And now the said *Martha Wentworth* comes and defends the force and injury when, &c. and says, that the said deed-poll in the said declaration mentioned, *is not her deed*, and of this she puts herself on the country, by

Miller and *C. Smith.*

And the plaintiff likewise, by

Daniel Chipman, *A. Marsh*, and *Squires.*

The counsel for the said *Benjamin Sumner* will take notice, that the counsel for the said *Martha Wentworth*, in the above action, under the issue aforesaid, agreeably to the statute in such case made and provided, will give in evidence,

Vermont Stat. vol. 1. p. 95. s. 98.

1st. That at *Portsmouth* aforesaid, to wit, at *Middlebury*, in the County of *Addison*, on the fourteenth day of *November*, A. D. 1785, the said *Michael Wentworth* conveyed in fee to the said *Benjamin Sumner* two other original rights or shares of land, one being in the township of *Middlebury* aforesaid, of which land the said *Benning Wentworth* was original proprietor, in full satisfaction of all demands he the said *Benjamin* had or might have, in and by virtue of the deed read to her on *oyer* as aforesaid, and the said *Benjamin* then and there received the

said conveyances in full satisfaction of all demands he the said *Benjamin* had or might have in and by virtue of said deed, upon which said *Benjamin* hath declared.

2dly. That the said *Benjamin Sumner*, in the year 1785, had knowledge that the said *Benning Wentworth*, in his life-time, had conveyed his original right of land in *New-Haven*, since in the City of *Vergennes* aforesaid, to some other person; that the said *Michael Wentworth* died in the year 1796, and was, from his intermarriage with the said *Martha* to the time of his death, a man possessed of a large estate.

3dly. That the *ouster*, eviction and expulsion, in the said declaration mentioned, was by the said *Benjamin* by fraud and covin obtained.* By

Miller and *C. Smith.*

' The above issue was put to the country. And now,

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* Section 98. of the act constituting the Supreme Court of Judicature, &c. provides, " That the general issue of not guilty, *nil debet*, or any other general plea proper to the action, whereby the whole declaration is put upon proof, according to the nature of the case, may be made by the defendant, under which general plea the defendant shall have liberty, upon the trial of the cause, on such general issues, to give any special matters in evidence in his defence or justification, as the nature of the action may be; the defendant giving notice in writing, with the plea of the special matter or matters on which he or she shall rely in such defence in justification. And no special matter shall be given or allowed in evidence, except such as shall be particularly mentioned in such notice or writing as aforesaid." This statute provision was undoubtedly *Vermont* Stat. vol. 1. p. 95.

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large with the deed; and every alienation of such estates not acknowledged and recorded as aforesaid, is hereby declared to be utterly void."

The object of this act is to be highly approbated. It is to secure the rights and interest of that estimable sex, who merit the primary protection of the Legislature, even the oppressed part of the sex, who possessing real estate in their own right might be compelled to sacrifice it to the menaces of a brutal or spendthrift husband; and the Court, we presume, will be careful to see that it is construed liberally in their favour.

The deed in question is not acknowledged conformably to the act, and we have seen that it is not merely *voidable*, but void at common law. If the deed is *void*, the covenants cannot bind. It would be a monstrous doctrine, that the Legislature should protect the *feme covert* from the oppression of an overbearing husband, by rendering her deed executed and acknowledged under this conjugal duress void, and yet leave her exposed *durante viduitate* to the obligations of the covenant made under the same duress.

Daniel Chipman, *e contra*, stated the nature of the action, admitted that coverture may be given in evidence under the general issue of *non est factum*, and also, for this argument, that if the deed be void, the covenants are also void; but he contended, that the deed is sufficient to pass the fee under our own statute, and read sect. 13. of the act regulating conveyances, &c. "that all deeds and other conveyances, the acknowledgment or proof of which shall have been or hereafter shall be taken without this State,

if certified agreeably to the laws of the state, province or kingdom in which it was taken, such acknowledgment or proof shall be as valid as though the same were taken before some proper officer or Court within this State."

Vermont Stat. vol. 1. p. 195.

He then read a statute of the State of *New-Hampshire*, where the deed in question was executed and acknowledged, passed in the year 1780; and insisted, that the deed was executed and acknowledged agreeably to this act, and therefore valid to pass the fee, and the covenants were therefore binding.

Stat. *N. H.* p. 19.

Hitchcock, for the defendant. The statute of *New-Hampshire* does not enable a *feme covert* to convey real estate, but supposes a person authorised to convey by common law. Besides, the proviso in that act restricts the right to convey, but in regulation of dower, and therefore can have no operation on this deed. The deed must therefore be considered as void; and if so, it is confessed the covenants are likewise void.

Curia advisare vult. In the afternoon sittings,

The Court decided, that the deed should not be read to the Jury.

Verdict for defendant by consent, and motion in arrest and for new trial, for that the Court had excluded in evidence the deed declared upon, contrary, &c.

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And now, at the adjourned term of the Court, *June*, A. D. 1800, the motion in arrest of judgment was argued.

Daniel Chipman, for the motion. We shall now contend,

1st. That the deed in question is valid; and

2dly. If not valid to pass the land, the covenants are binding on the defendant.

Originally no freehold could pass without *livery of seisin.* This was found inconvenient in the country of our ancestors, and, among a variety of modes contrived by the subtlety of conveyancers to avoid this inconvenience, that of a *fine* was introduced, which is defined to be "an agreement of the parties on record, by which lands are transferred from conusor to conusee, with or without a render; and this is esteemed a conveyance of greater security than a feoffment, or the investiture by livery [of seisin;] but having the constant and undoubted credit of a Court to protect and support it, and this further convenience and security, that it does not only transfer the right of the vendor and all claiming under him, but likewise extinguishes the right of others, who omit to make their claim in due time. *Bac. Abr.* vol. 3. p. 189. Our *English* ancestors, by bringing the transfer of land upon the records of their Courts of Justice, by a fictitious suit at law avoided the livery of seisin. We have adopted a more manly mode to avoid the inconvenience of livery. We have abolished the feoffment by livery, established certain offices, where our deeds being recorded, after being conformed to certain prerequisites, shall pass the

land. The object of the *English fine* is to give the same or greater notoriety to the transfer than was intended by livery of seisin. The object of our records is the same. The *English* doctrine of fines and recoveries ought therefore to apply to the construction of our statute regulating the conveyance of real estate.

We find under the *English* doctrine of fines and recoveries, sufficient to cover our whole case:

That a *feme covert* may levy a fine with her husband upon lands held in her own right.

That if *baron* and *feme*, by fine *sur concessit*, grant land for 99 years, and warrant the said land during the term, and *baron* dies, and the grantee is evicted by one who hath a prior title, he may thereupon *bring covenant against the feme*, notwithstanding she was covert at the time when the fine was levied. *Bac. Abr.* vol. 1. p. 496.

Mr. *Chipman* then went more largely into the consideration of the statute of *New-Hampshire*, and insisted that the deed was executed and acknowledged within the purview of that act; as in the trial *per pais*.

Hitchcock, e contra. Our opponents have endeavoured to shew the analogy between our statute regulating the conveyance of real estate, and the *English* fine and recovery. They unfortunately have omitted one very striking resemblance. Under our statute a *feme covert* cannot convey her inheritance without a private examination by a magistrate; and the *English* authorities inform us, that if husband and wife join in a fine to convey her own inheritance, it ought to be received, if *upon her examination* it ap-

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pears to be voluntary and free from restraint; for where she is to convey or pass any estate or interest either by herself or jointly with her husband, there she ought *to be examined.* 2 *Inst.* 515. And it is worthy observation, that the very reason given in the books why a *feme covert* cannot bargain and sell her lands alone, or with her husband by deed indented and enrolled is, that she cannot (in such case) be *examined* by any Court without writ, and there is no writ allowed in such case, as in case of fines.

Bac. Abr. vol. 1. p. 497.

But it is said, if the land did not pass by this deed, still we are holden by the covenants. If the land did not pass, what did the joinder of the *feme covert* in the deed amount to? Could it to any thing more than the signification of her consent to her *baron's* act? Was not the act his own and the covenants his own. Should not the action have been brought against his legal representatives? A case is cited where baron and *feme* grant land by fine *sur concessit.* In such case it is certain, although not stated, that the feme *passed examination.* But if she did not, what is the nature of a fine *sur concessit?* Is it to pass land in fee? Judge *Blackstone* says it is to pass land for life or years. Does it touch the grant in the present case?

Bl. Com. vol. 2. p. 353.

Would it be equitable, that the purchase-money of the estate sold as in the present case, should merge, if we may borrow a term from the realty, in the husband's personal estate, which may be expended, or if not, of which the widow can have only her thirds, when not debarred by jointure or will, and she be exposed to judgment in damages for the whole breach of the covenants, which might sweep

her whole dower, whilst the heirs at law escape with impunity? Could any action be sustained by the widow (in case judgment should finally be rendered against her) against the heirs to compel contribution?

In the trial to the Jury, we observed upon the statute of *New-Hampshire*. We only add, that the Court have that statute and our own before them, and are abundantly competent to give the true construction to both.

Nathaniel Chipman, in support of the motion.

There are two questions in this cause:

First. Whether the deed of the *feme covert* is attended with those formalities which make it valid.

Secondly. Whether, if sufficiently formal to convey the land, the *feme covert* shall be holden by the covenants.

If this case depends on common law principles, the deed is not valid, as there is no other mode of common law conveyance by a *feme covert*, than that of fine and recovery. The case then wholly depends on the inquiry, whether there are any statute or statutes regulating conveyances, which operate on this deed to make it valid.

The statute of *New-Hampshire* gives the *baron* and *feme* the power and right of conveying land in the mode pointed out by that statute, to wit, by signing, sealing, acknowledging and delivering, and this without any other act, according to the true construction of the statute, supersedes any other mode of conveyance. This construction is a sound one, and acknowledged by the restricting clause of our statute, which contemplates a mode different from

Vermont Stat. vol. 1. p. 195. s. 13.

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our own, to wit, such mode as is conformable to the laws of the state, province or kingdom in which the deed is executed. If this be the sound construction of the laws passed on this subject, this deed must be valid, and the question then arises whether the *feme covert* shall be bound by the covenants in the deed. The doctrine cited from *Bacon's Abridgment* we consider to be in point. It is a mistaken idea, that the fine *sur concessit* is confined to a grant for life or years. Judge *Blackstone* says it is *usually* for life or years; which implies, that it is not always so; but if I am not mistaken, the case of *Wotton* and *Hale*, quoted in the margin of *Bacon's Abridgment*, shews *that* grant was in *fee*, but the authority is not present.

Bac. Abr. vol. 1. p. 496. 2 *Keb.* 684. 703.

It is said to be inequitable to recover damages against the widow in this action, and a doubt is raised whether she could compel contribution among the heirs of her late husband. This Court will *consider* the case *sub judice*, and not perplex the present motion with the consideration and resolution of possible cases.

We conceive it clear, that the deed was improperly excluded from the Jury, and therefore we are entitled to a trial *de novo*.

Judgment of Court. New trial not granted. Motion dismissed with costs.

And now, *on review*, *January* term, A. D. 1801, the cause went again to the Jury. Exception was again taken to the deed's being read in evidence. Further argument was heard, and the Court finally

decided, that the deed could not be read to the Jury in support of the plaintiff's declaration. Sumner v. Wentworth.

Plaintiff nonsuited.

Nathaniel Chipman, *Darius Chipman*, *Daniel Chipman*, *Amos Marsh*, and *T. Squires*, for plaintiff.

S. Hitchcock, *S. Miller*, and *C. Smith*, for defendant.

JOHN N. BENNET, Appellee,
against
DAVID WHITNEY, Appellant.

THE attorney for the appellant, on the *third* day of the term, moved to enter his appeal. He stated, that after the Court arose the *second* day of the term he delivered the copies certified by the Clerk of the County Court to the Clerk of this Court; and that he, with other counsel for the appellant, were detained on their way to Court, by the act of Providence. Appellant allowed to enter his appeal on the *third* day of term, being retarded by rigour of season.

Storrs, for appellee, opposed the motion as repugnant to the rule of Court, and cited *memoriter* the case of *Daniel Squire* v. *Daniel Chipman*, before this Court, where, on a like motion, the Court decided the appellant should not have leave to enter his appeal.

Bennet v. Whitney.

By the Court. The inclemency of the season is singular and evident, and ought to operate a reasonable excuse for the neglect of the appellant. Let the appellant enter his appeal without costs.

MATHEW PHELPS, Appellee,
against
MOSES GODDARD and BUEL HITCHCOCK,
Appellants.

Combination to entice a citizen within the jurisdiction of another State for the purpose of procuring him to be arrested on civil process, is actionable, tho' the debt for which he is arrested is justly due.

ATTACH *Moses Goddard* and *Buel Hitchcock*, of *Addison*, in the County of *Addison*, *et al.* to answer unto *Mathew Phelps*, of *New-Haven*, in the same County, in a plea of trespass on the case. Whereupon the plaintiff declares and says, that at *New-Haven* aforesaid, on the 20th day of *July*, A. D. 1798, he the plaintiff then was, long before had been, and still is an inhabitant of said *New-Haven;* and the said defendants, combining, conspiring and confederating together to wrong and injure the plaintiff, did entice and persuade the plaintiff to go to *Crown Point*, within the jurisdiction of the State of *New-York*, from his home and his friends, and from the State of which he was an inhabitant as aforesaid; and the plaintiff so being fraudulently enticed and persuaded from his friends and acquaintance, among strangers and out of the State of which he was an inhabitant as aforesaid, at *Crown Point* aforesaid, in the State of *New-York* aforesaid, on the 20th day of *July* afore-

said, they procured the plaintiff to be arrested on a process issued from the Supreme Court of the State of *New-York* aforesaid, in the name of one *William Finch* against the plaintiff on an old demand in favour of the said *William Finch* against the plaintiff for the sum of three hundred dollars, from the payment of which said demand of the said *William Finch* he the plaintiff had long before the arrest aforesaid been exonerated in this State by the statute of limitations; and the plaintiff being so arrested as aforesaid, on the process aforesaid, for such demand of the said *William* as aforesaid, was on said process then and there, to wit, at *Crown Point* aforesaid, on the same 20th day of *July* aforesaid, held a prisoner for the space of six hours, when the plaintiff, for the purpose of obtaining his discharge from said imprisonment, at great trouble and expense procured and entered bail for his the plaintiff's appearance in said action before the Supreme Court of the State of *New-York* aforesaid; and the plaintiff further says, that the said *Moses, Buel et al.* further fraudulently combining and confederating together against the plaintiff as aforesaid, procured the process so served on the plaintiff as aforesaid to be returned to the Supreme Court of the State of *New-York* as aforesaid, and entered in said Court, where the same process aforesaid is yet pending, and he the plaintiff is liable, by the laws of the State of *New-York* aforesaid to have a judgment of the said Supreme Court rendered against him in the process aforesaid, for the whole sum of the aforesaid demand so existing against him by the laws of the State of *New-York* as aforesaid, although the same demand had, long before the confederacy and

Phelps v. Goddard and Hitchcock.

combination of the said *Moses*, *Buel*, &c. and their arrest of the plaintiff so made as aforesaid, been barred by the statute of limitations of this State. By reason of which the plaintiff hath been put to great cost, charge, expense and trouble in defending in the action aforesaid on the process aforesaid, on which he the plaintiff was so arrested as aforesaid, and by the fraudulent combination and confederacy of the said *Moses*, *Buel*, &c. as aforesaid, is injured and made worse, as he says, 3,000 dollars.

Goddard and *Hitchcock* arrested, and *non est* as to the other confederates.

At the County Court, the cause went to the Jury on the general issue. Verdict for plaintiff, 100 dollars. Defendants gave notice they should waive their plea at the Supreme Court, and demur generally to the declaration.

At this term, the demurrer was argued and decided.

Amos Marsh, in support of the demurrer. This is a novel declaration. If we should search from the earliest book of entries to the most modern, we shall never find one of this nature. It is true, variety of injury will continually produce a variety of declarations in case. But then, to be correct, although they differ in allegation, they must be founded on the great and leading principles of the law. This declaration appears to be equally destitute of form and principle. In the present argument we shall not descend to notice the defects of form, which may possibly be cured by jeofails; but we shall contend against the substance of it.

This declaration allegates, that my clients, with others, combining and confederating, not with force and strong hand, not *vi et armis* and with breach of the peace, but by *enticement*, persuaded the plaintiff to go with them within the jurisdiction of a neighbouring State, and there procured him to be—what? arrested to respond to a just debt due to one of the citizens of that State, and recoverable by its laws, although barred by our statute of limitations. To exhibit this novel declaration in all its naked deformities, we have only to apply to the plaintiff himself. Let us question him. Is not the debt for which you were arrested due? He answers by his declaration, it is. Is it not a just debt? He confesses, that though *an old*, yet it is a debt justly due. Did my clients assault you? did they batter, beat or wound you, until you were forced to pay it? No; but they caused me to answer for my neglect in failing to pay an honest debt, before one of the most upright and intelligent State Courts in the Union. Of what, then, do you complain? Hear his reply from the declaration itself: "By the law of the State where I reside, my creditor is for ever barred from bringing any action against me to compel me to pay this just demand; and I had hoped, under the letter of our statute of limitations, to defraud my creditor of his property; and now your clients have enticed me to act like an honest man, and I am persuaded this Court will make them respond in damages for this grievous wrong."

Is not this substantially the language of the declaration? But let me ask seriously, is it a language which ought to be heard in this Court of Justice? I

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have ever been taught, that he who crieth for justice against others, should first do justice himself.

Miller, e contra. It is true our declaration is new, but certainly it is incorrect to assert, that it is not founded on principle. To every possible injury the law supplies a possible and adequate redress. Here is an injury sustained by the plaintiff inflicted upon him by the combination and deceit of the defendants and their associates; and shall it be held, that he has no remedy. It is true, we can find no precedents in our books of entries: but the reason is plain; such an injury could not have been inflicted in *England;* it grows out of the state sovereignties. Here we have seventeen sovereignties, independent of each other as to their internal regulations and municipal laws. Their laws operating on contracts are various. In one State an action upon a species of contract is limited to a lesser, in another to a more extended term of years. In transitory actions limited by statute in one State, and not barred in another, it is to be expected that the creditor will prosecute for judgment in that where his demand is recoverable, if he can bring the debtor within process. This often operates hardly upon him, who may be compelled to respond a demand in a sister State, when he is debarred from recovering a demand of the same age and nature in his own. It is to be regretted that provision was not made in the Federal Constitution to enable the Legislature of the Union to establish some uniform system of limitation of civil actions, if not on torts on contracts. As it is, the subject has often occupied the attention of the various State Judiciaries. In some

States the Judges have decided, that the *lex loci* where the contract was made should govern; in others they have considered both the action and the contract transitory, and have subjected a contract made in another State to the laws of their own. In other States—but it is unnecessary to state the various decisions in the different States in the Union. Among these jarring decisions, we in this State have an equal right to our opinion. Our Legislature have a sovereign right to enact statutes of limitation. Our Supreme Court will, we trust, consider that it is the great object of their appointment to carry the laws of the Legislature into effect; and it is the right of the citizens to be protected by those laws. If an action is limited by our laws, he who abides within our jurisdiction can never be exposed to such action; and they who combine to entice him within a jurisdiction where the action is not limited, shall respond in damages. This doctrine is not entirely novel. In *Root's Reports*, p. 59. we find a case of *David Leavitt* and two others v. *Peter Sherman*, which shews, that the Supreme Court in *Connecticut* considered an action of this nature would lie, although the Court decided that the demurrer was sufficient, upon the exception there taken, viz. that one of the plaintiffs, who was not arrested, joined in the action with two others who were.

The present action is not brought against the creditor who was in pursuit of his debt, against the officer executing a legal precept; but against men, strangers to the contract, but neighbours to the plaintiff, probably bribed to entice their unwary and unof-

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fending neighbour into a scene of costs, vexation and trouble.

Court. Read to us authorities to shew, that merely enticing a person to become obnoxious to civil process for a just demand, is actionable.

Miller. With submission, this is not a just, that is, a legal demand. We wish to know where the line shall be drawn.

Court. If personal force is applied, an action of trespass *vi et armis* will lie; and the Court will be very liberal in their inquiry after consequential damages. But you have allegated no force. You may at least shew some analogous cases, if any exist.

Daniel Chipman. We have already stated that the case is novel, and we can shew no precedent. But we argue from the nature of the thing. The declaration exhibits a peaceable citizen engaged at home in his domestic concerns, not concealed either in person or property from his creditors, but amenable at all times to the laws of the government which he renders his taxes and personal services to support. If such a man is enticed into a foreign jurisdiction, and there exposed to all the costs, inconveniences and vexations of a lawsuit among strangers, by the combination and deceit of his neighbours, who being strangers to the suit, to suppose them bribed is attributing the best possible motive to their conduct. If such an event takes place, the moral sense rises against it. We feel that the man is injured, and all

see, that from the common principle of justice he ought to have redress.

Court. But if the debt is *bona fide*.

Chipman. With submission we conceive, that if the debt *is* honest, it makes no odds. We have wholesome laws, and our citizens are entitled to their protection; and I have no idea that the defendants shall be permitted to take us from this State, and say, "We will take you from a land where no justice is found, and carry you where it is well administered." If this action will not lie, neither will an action, if a citizen were enticed to *Europe*, and there made liable to decision upon a contract made here under some usage or practice which might run counter to all our ideas of justice, and to the very intention of the parties contracting.

We have ever been taught that the law abhors deceit. Why should it be made to countenance it in this instance? If this demurrer prevails, will it not be sanctioning fraud by law? If our client had concealed himself or property, there might have been possibly some excuse for some kind of art in enticing him into daylight.

This declaration is in the nature of an action of conspiracy, and there is surely sufficient set forth in it, to sustain it on demurrer. If there is but a trivial injury sustained, this should not operate in demurrer. Let the quantum be the object of inquiry after damages. We shall shew, if permitted, under this declaration, the combination of the defendants and their confederates, and the injury we have suffered by being enticed from the protection of our own laws,

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within a foreign jurisdiction. If the demand of *Finch* is just, which is the pretence for this violation of our rights, is it therefore no injury to be compelled to attend a Court at a great distance, to be subjected to the necessary and augmented expenses in a strange land, to say nothing of the fees of advocates, which are known to be much greater than in our own Courts.

Darius Chipman, for the demurrant. Our opponents having argued themselves into the opinion that there is no substance in their declaration, now seem determined to rely upon the form. The declaration is said to be in the nature of an action of conspiracy, and that there is sufficient to sustain it in the very language of it. Every sufficient declaration in trespass on the case must set forth an *injury* sustained by the plaintiff, and make out a case for which an action will lie. The merely stating that the defendants have confederated and combined, unless some injurious and unlawful act is stated as the consequence of their combination and confederacy, is of no more avail than if the plaintiff had allegated that defendants had confederated and combined to feed and clothe the plaintiff. The gist of the action of conspiracy is an injury sustained as the effect of it. Here is none set forth, unless the exposing a man to justice is an injury.

After so much has been said of the just abhorrence in which the law holds deceit, it seems confessed that there is a certain *pia fraus* at which my brother *Chipman's* morality does not revolt. He acknowledges, that if the plaintiff had concealed himself and property, some kind of deceit might have been lawfully used to

entice him into daylight. But where is the difference? In this case were not the plaintiff and his property effectually concealed from his creditor? He had not, it is true, hidden himself in the caves of the rocks, but he had completely concealed himself from his honest creditor under the dark cloud of our limitation statute.

But wherein consists the moral turpitude of the deceit allegated to have been practised; for the charge of bribery is *dehors* the record. *I* should esteem it a *moral* duty to assist an honest creditor in recovering a *bona fide* debt.

It is said this action is not brought against the creditor or officer making the arrest; conceding, I presume, that it could not be maintained against either of them. But if the act was legal in them, is it not in my clients, their servants?

But if this declaration should be sustained, what is to be the measure of damages? Shall it be *Finch's* demand? The action upon that demand, we learn from the declaration, is now pending in the Supreme Court of the State of *New-York*. The writ may abate, or judgment may be for the present plaintiff; or if judgment for *Finch*, it may be reversed by error. Can we now know what will be the quantum of damages in that suit? If we could, is it right that my clients should respond it in damages under the present suit?

It is said, costs will accrue in that suit, and advocates' fees will be great, and expenses of attendin Court will be heavy. But if these are taken into consideration in the inquiry after damages in this suit, would not such items be the foundation of an action

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in every case where a citizen of this State seeks redress against his fellow-citizen in another State, where the expense of living, costs of Court, and fees of advocates, may be higher than in this State?

The case cited from *Root's Reports* does not touch the present case.

On the whole, we consider that the plaintiff, in the declaration in question, has set forth no cause of action. If he has counted on any damage sustained, it is *damnum absque injuria.*

The Chief Judge delivered the opinion of the Court.

It is to be regretted, that so wide a difference in the laws of the respective States of the Union, and of the decisions of their Courts upon similar subjects, exist. It often operates to the detriment of suitors. It is to be hoped, that at some not far distant day, *the publication of reports* of decisions in the State Courts will effect a greater uniformity in law and decision. Until then, nought remains but for each State to promulgate such laws as meet the sense and habits of its own citizens, and for each State Judiciary to administer them faithfully.

The Court are not prepared to say that they would sustain an action *as* against *Finch* the creditor, who had undoubtedly a right to give the plaintiff reference to his own State laws and Court, to obtain payment from the present plaintiff of a *bona fide* debt recoverable in that State, but limited in ours.

But the present defendants were strangers to the contract, had no interest in the suit instituted to compel the fulfilment of it, and were fellow citizens with

the plaintiff. It certainly is not for the peace of society to sanction combinations to entice our fellow-citizens within the jurisdiction of other States, and the process of their Courts. The law abhors deceit, and it is to be hoped that our halls of justice will be the last places polluted with the maxim of modern ethics, that the end justifies the means.

The laws of the Union, and those of our own State, provide for the apprehension and removal out of the State, of persons charged with crimes committed in another State; but they have made no such provision in civil process.

Let judgment be entered that the declaration is sufficient, and that the defendants answer over.

S. Miller and *Daniel Chipman*, for plaintiff.
Amos Marsh and *Darius Chipman*, for defendants.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, JANUARY TERM, A. D. 1801.

ENOCH WOODBRIDGE, *Chief Judge*.
LOTT HALL, *NOAH SMITH*, } *Assistant Judges*.

ASA FARNUM *et al.* Appellants,
against
SOLOMON BARNUM *et al.* Appellees.

In case upon a written contract, it may be read in evidence to the Jury, if it substantially comports with the declaration.

PLAINTIFFS declare, that the defendants, on the 17th of *May*, 1797, in consideration that the plaintiffs forebore to prosecute *Solomon Barnum* for divers sums due from said *Solomon* to them, the amount thereof thereafter to be ascertained by and between the said *Solomon* and the plaintiffs, if said *Solomon* did not pay such sums within two years from the day last mentioned, they the defendants

would pay on demand; that on the 19th of *February*, 1798, *Solomon Barnum* and the plaintiffs did compute and ascertain such sums, and there were found due to the plaintiffs, 1,556 dols. 70 cts. of which the defendants on the same day had notice; that the plaintiffs did forbear to prosecute *Solomon Barnum*, and that he neglected to pay said sum; that the two years had elapsed, and defendants had due notice, and had neglected, &c. All which will more fully appear by the defendants' memorandum in writing dated the 17th of *May*, 1797.

General issue joined, and the cause put to the Jury.

Plaintiffs now offered the following writing in evidence:

Know all men by these presents, that we, *Solomon Barnum*, *Thomas Barnum*, *Jabez Barnum*, *Zacheus Barnum*, and *Philip Smith*, all, &c. are held and stand firmly bound unto *Asa Farnum*, *Oliver Root*, and *Jonas Abbot*, of, &c. merchants trading in company by the name of *Farnum*, *Abbot & Root*, in the sum of one thousand pounds lawful money, for the payment of which we bind ourselves, our heirs and assigns, by these presents, dated at *Shoreham* this 17th day of *May*, 1797. The condition of the above bond is, however, such, that whereas *Solomon Barnum*, of, &c. now stands indebted to the above mentioned *Asa Farnum*, *Oliver Root*, and *Jonas Abbot*, for certain sums of money, as will appear by his the said *Solomon's* notes executed to the said *Farnum*, *Abbot & Root*, at divers times, and also by their books; all of which, if the said *Solomon* or his assigns do well and truly pay or cause to be paid unto the above-named

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Farnum, Abbot & Root, their heirs and assigns, the full and just sum or sums of money, which, on an adjustment of accounts, appear to be due to them the said *Farnum, Abbot & Root*, with the lawful interest, so fast as the said *Solomon* can, using every effect which shall mostly facilitate the payment to them the said *Farnum, Abbot & Root*, from time to time, the last payment of which is to complete the full sums which shall appear to be due, is not to exceed two years from the date above: then this bond to be void, otherwise, &c.

Subscribed by the four *Barnums* and *Philip Smith*, but not sealed.

Benson, February 19th, 1798. Then, on a settlement between the aforesaid *Farnum, Abbot & Root*, and *Solomon Barnum*, there is found due from the said *Solomon*, 1,556 70-100 dollars, for which the said *Solomon* hath given his note to *Asa Farnum;* the payment of which we hold ourselves bound to pay on his failing or neglecting to pay the same when thereunto called on, provided we are not called upon before the 15th day of *May*, 1799.

Subscribed by the four *Barnums* and *Philip Smith*, and indorsed.

Daniel Chipman, for defendants, objected to the writing being read to the Jury.

This writing appears not to be under seal. If that had been the case, we might have been estopped from impeaching an instrument upon the present grounds of exception, to which the rules of law had annexed a technical importance. Instruments of the loose nature of the present, the law exposes to a strict scru-

tiny, and there must be found on the face of them all the features of a legal contract. We except to this,

First. Because it does not appear that there is any consideration for the promise purported to have been made, it is a mere *nudum pactum*. The only semblance of consideration is a forbearance of suits *generally*. Such general considerations cannot operate in law.

Secondly. The promise contained in the paper varies from the promise alleged in the declaration. The promise in the paper is grounded on the reasonable exertions of *Solomon Barnum*. If he did not make payment, plaintiffs might call upon him at any time; and if two years elapsed, and he did not make payment, then the defendants assumed.

The promise declared upon is, that if *Solomon Barnum* did not pay such sums within two years from a certain day, the defendants would pay on demand.

Thirdly. It appears by an indorsement on the writing in question, that by computation by the plaintiffs and *Solomon Barnum*, there was found due to the plaintiffs on settlement on the 19th of *February*, 1798, 1,556 dols. 70 cts.; that *Solomon Barnum* gave his note for that sum to *Asa Farnum*, and the other defendants gave their assurance for the payment of this note. This certainly extinguished the first promise, which is that declared on.

Israel Smith, for the plaintiffs. These exceptions are matters to be considered by the Jury, not by the Bench. There can be no question but here are the right parties. Whether the construction of the pro-

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mise declared upon be different from what is insisted upon by the plaintiffs, is a matter of fact for the Jury. Part of the promise is reduced to writing; part rests on parol testimony. Surely a promise may be reduced to writing, and the consideration omitted and afterwards substantiated by parol evidence. If, in a promissory note, the words "value received" should be omitted, might not the consideration of such note be shewn by parol testimony?

To the second exception we reply: It is a rule of law, that actions upon covenants reduced to writing may be brought on the covenants, or on the penal part; so, by parity of reason, we may bring this action upon the parol or written part of this promise: but we can discern no variance in the promise declared upon, and the promise in the instrument offered in evidence. By a fair construction of both, *Solomon Barnum* was to have two years to make payment, and so fast within the two years as he could, which was to rest on himself. In case of *Solomon Barnum's* failure at the expiration of two years, the defendants were to be liable, and no suits were to be brought in the mean while.

But our opponents say, thirdly, that they discover in the indorsement upon the instrument, that a promissory note has been executed by *Solomon Barnum* to *Asa Farnum* only; and this operates an extinguishment of the joint demand of the present plaintiffs. But the instrument which we offer speaks of a sum uncertain, which was to be ascertained. The adjustment indorsed on the same paper was in pursuance of the spirit of the contract. It was necessary that such adjustment should take place, in order to

make the defendants liable. A note is made to *Asa Farnum*, one of the plaintiffs, but must it not be considered as made to him in trust for the use of the others. The simple statement of the case is, that the defendants promised to pay the debts of one of them in consideration of forbearance; the sum uncertain, and to be reduced to certainty by a computation to be made by the plaintiffs and the debtor; the computation is made, the sum ascertained, and a memorandum in writing in the form of a promissory note given to one of the plaintiffs, and all the defendants engage to pay the contents of the note, being the sum ascertained by the indorsement, which is but affirming the promise of their primary contract. Does this extinguish the promise declared upon? Can accord be pleaded without satisfaction? Was a mere charge of security, if we consider it in this light, ever considered as payment?

The doctrine of extinguishment is clear. The general rule is, that a creditor accepting a higher security than he had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt. *Bac. Abr.* vol. 3. p. 106.

But the accepting a security of an inferior nature, is by no means an extinguishment of the first debt; as if a bond be given in satisfaction of a judgment. *Cro. Jac.* p. 649, 650. *Brownl.* p. 29.

Also the accepting of a security of *equal degree*, which at the worst is our case, is no extinguishment of the first debt. *Cro. Eliz.* p. 304. 726, 727. *Brownl.* 74. 1 *Burr.* 9.

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HALL, Judge. The point which labours with me is the alleged variance between the promise declared upon, and that contained in the writing offered in evidence. If they substantially differ, the paper adduced cannot be read in evidence.

Daniel Chipman. If a man brings an action upon a written contract, he must produce a writing conformable to his statement in his declaration, and not be allowed to produce a writing which contains extrinsic matters, which require to be buttressed by parol testimony. The facts are immaterial, but as they shew a variance; and to this purpose we mentioned the note given by *Barnum* to *Farnum*. Questions of construction of contracts may be proper for a Jury; but here the question is not whether *their* or *our* construction is better, but whether there is a variance in the promise declared on and the promise in the writing produced. We did not mean to rely upon the doctrine of extinguishment of debts. The note from *Barnum* to *Farnum* was mentioned merely to shew the variance. But surely, if the defendants in this case had given a promissory note to the plaintiffs, containing the sum adjusted, it would have extinguished the contract declared upon.

By the Court. Let the writing be read to the Jury. It appears to be substantially the same with that proferted in the declaration. *Hesitante Hall.*

Israel Smith, for plaintiffs.
Daniel Chipman, for defendants.

JASPER L. DRAKE, Appellant,

against

NATHANIEL COLLINS, Appellee.

A promissory note deposited with arbitrators, subject to their indorsement to the amount of their award, is void.

THE plaintiff declared on the following promissory note:

January 24th, 1798.

For value received, I promise to pay *Jasper L. Drake* eighty dollars; as witness my hand,

Nathaniel Collins.

General issue found, and cause to the Jury.

Israel Smith, for the plaintiff, stated this to be what is commonly called an arbitration note. Some dispute had arisen between the parties, who agreed to submit their differences to arbitrators indifferently chosen; that a day and place were agreed upon for the arbitrators to meet. Cross promissory notes of equal tenor and date were made by the parties, and deposited with the arbitrators, with power according to the submission to reduce by indorsement the note made by him against whom the award might be made, to such sum as should be found due by the arbitrators, and to deliver the same with his own note to the other party. That the note declared upon was one of these notes. That the arbitrators met on the day and place appointed. The parties appeared, when *Collins* objected to proceeding to business, alleging that his witnesses were not present, and that it was too late in the day for him to procure them. The

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parties then agreed that the matters in dispute should be submitted to the arbitrators upon their own statement; and if either was discontented with the award, he should be entitled to a rehearing the next day, when he might produce his witnesses. They accordingly submitted the matter in dispute to the arbitrators, who published their award. *Collins* declared himself discontented. The arbitrators convened the next day, at the same place. *Collins* did not appear to claim a new hearing. The arbitrators reduced the note declared upon to the sum found due to the plaintiff by their award, and delivered the note, together with his own, to him, according to the terms of the submission. And to recover the contents of this promissory note, his client had brought the present suit.

Chief Judge. If this statement be correct, and this note was given to abide the award of arbitrators in the mode stated, it has been settled by the Court, that such notes are void.

Darius Chipman, for the plaintiff. Can this be taken advantage of under the general issue?

Chief Judge. It goes to the consideration of the note, and may be taken advantage of under the general issue. It is a question, whether, after confession and judgment to enforce an arbitration award, such judgment would not be set aside.

HALL, Judge. I do not consider arbitration notes *ipso facto void*, but *voidable*. I conceive that the

award and every other circumstance may be gone into under the general issue.

Chief Judge. I carry the principle further. I consider such notes as void for want of consideration; but the fact, whether arbitration note or not, may be left to the Jury.

Smith, Judge. When this subject was first started, I was rather inclined to be in opinion with my brother Hall, that arbitration notes, as they are styled, are not in themselves *void*, but merely *voidable;* that when a suit is commenced upon such note, the defendant under the general issue must first shew that the note declared upon is of this nature, and then may be let in to impeach the submission, the conduct of the parties and of the arbitrators, the award—every circumstance relative to the transaction. But if this doctrine has been done away by repeated decisions, as stated by the Chief Justice, I should think it my duty to acquiesce in such decisions, although none such ever came to my knowledge, and such decisions must have been made before I had the honour of a seat on this bench.

Witnesses were now sworn, who established the facts substantially, as stated by the leading counsel for the plaintiff.

The Chief Judge, in his charge to the Jury, observed, that the note was *prima facie* evidence of a legal demand by plaintiff against the defendant; that there were two points made in the defence:

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First. That it was an arbitration note, and as such not recoverable by law.

Secondly. That if recoverable as an arbitration note, yet there were circumstances attending the arbitration which inhibited the plaintiff from recovering.

If they were convinced this was an arbitration note, they must find a verdict for the defendant; for it had been decided before and since he came upon the bench, that such notes are in themselves void, there being no legal consideration in them.

As to the second point, he believed the Jurors would have no occasion to make it the subject of their inquiry. If, however, they inclined to consider it, they had heard the evidence, and might apply it to the cause.

Verdict for defendant.

Israel Smith and *Darius Chipman*, for plaintiff.

DARIUS CHIPMAN, Appellee,

against

JAMES SAWYER, Sheriff of Chittenden County.

DEBT on an escape.

Summon *James Sawyer*, Esquire, sheriff of *Chittenden* County, to appear, &c. and answer unto *Darius Chipman*, in a plea, &c. that to the plaintiff the defendant render and pay the sum of 69 dols. 25 cts. which he justly owes, and unjustly detains from him; for that whereas the *plaintiff, on the demise of James M'Gregor, Esquire*, of *Londonderry*, State of *New-Hampshire*, heretofore, to wit, by the consideration of the County Court holden at *Rutland*, within and for the County of *Rutland*, on the *Monday* next preceding *the third Tuesday of March*, 1793, recovered judgment against *Janna Churchill*, late of *Hubbardton*, in the County of *Rutland*, now of *Georgia*, in *the County of Franklin*, for the sum of eight cents damages, and for the sum of 69 dols. 27 cts. costs of suit, as by the files and records of the County Court, ready here in Court to be shewn, may fully appear; which said judgment yet remains in full force, strength, and effect, in no wise reversed, annulled, paid or satisfied; and the plaintiff further saith, that the said damages and costs, so by him in manner and form aforesaid recovered, being unpaid and unsatisfied, he the plaintiff, on the 15th of *April*, 1799, prayed out his certain writ of execution of that date, at the price of twenty-five cents, in due form of law, for the sum aforesaid, made returnable in sixty days from the

Nominal plaintiff in ejectment cannot maintain an action against sheriff for an escape of a defendant committed on an execution *in his name* for the damages and costs recovered in the action of ejectment.

Sheriff, as keeper of the prison to which is committed a debtor from another County, not liable for a negligent escape of such debtor.

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date, signed by *Nathan Osgood*, Clerk of said County Court, directed to the sheriff of *Franklin* County, &c. commanding him to levy the said writ of execution on the goods, chattels or lands of the said *Janna*, if to be found within his precincts, sufficient to pay and satisfy the said sums contained in said writ of execution, together with fees for levying the same; and for want of such goods and chattels, to be by the said *Janna* shewn to him, to take the body of the said *Janna*, and him commit to the keeper of the *gaol in Burlington, in the County of Chittenden*, within said prison, there to be safely kept until he the said *Janna* should pay and satisfy the said sums contained in said writ of execution, together with all legal fees which might accrue in consequence of said commitment, or until he should be discharged by the said *Darius* or otherwise, by order of law; which said writ of execution afterwards and before the return day thereof, to wit, on the first day of *June*, 1799, was by the plaintiff delivered to *Prince B. Hall*, who then was, and for more than sixty days after continued to be sheriff of the County of *Franklin*, and afterwards and before the return day of said writ of execution, to wit, on the 7th day of *June*, 1799, he the said *Prince B. Hall* continuing to be sheriff of the County of *Franklin* as aforesaid, for want of goods and chattels of the said *Janna*, by virtue of said writ of execution arrested and took the body of the said *Janna*, and him committed to the defendant, who then was and still is sheriff of the County of *Chittenden*, and by virtue of his said office of sheriff, keeper of the common gaol in said County of *Chittenden*, within the said prison; and the defendant then and there, to wit,

on the 13th day of *June*, 1799, at *Burlington* as aforesaid, received the body of the said *Janna* as aforesaid, him safely to keep within said prison, according to the precept of said writ. Nevertheless the defendant, not regarding the duties of his said office as sheriff as aforesaid, after the commitment of the said *Janna* as aforesaid, he the defendant being sheriff as aforesaid, to wit, on the said 13th day of *June*, 1799, at *Burlington* aforesaid, suffered the said *Janna* to go at large out of said prison whither he would, and so to escape from said prison and the liberties thereof, whereby an action hath accrued to the plaintiff, to have and demand of and from the defendant the said sum of 69 dols. 25 cts. yet, &c. *ad damnum*, 100 dollars.

The defendant craved *oyer* of the record in the plaintiff's declaration mentioned, which is read to him in the words, &c.

Be it remembered, that at County Court begun and holden at *Rutland*, within and for the County of *Rutland*, on the third *Tuesday* of *March*, 1793, present in Court the Chief Judge and Assistant Judges, *Janna Churchill*, of *Hubbardton*, in the County of *Rutland*, was summoned to appear before said County Court, at this term, begun and holden at *Rutland*, within and for said County, on the third *Tuesday* of *November*, 1788, then and there to answer unto *Darius Chipman*, of said *Rutland*, in a plea of trespass and ejectment; whereupon the plaintiff complains, that *James M'Gregor*, of *Londonderry*, in the State of *New-Hampshire*, *executor of the last will and testament of David M'Gregor*, *deceased*, had, on the 10th day of *March*, now last past, granted and to farm

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letten to the plaintiff, a certain messuage or farm of land bounded as follows. Plaintiff here describes the land as being part of Lot No. 19. severed to the proprietary right of *Joseph Purdy*, and part of Lot No. 20. severed to the right of *John Moore*, situated, lying and being in *Hubbardton* aforesaid, and now or late in the tenure and occupation of *Janna Churchill* or his assigns; to have and to hold the said tenements, with the appurtenances thereof, to the plaintiff and his assigns, from the first day of *January* then last past, to the full end and term of fifteen years from thence ensuing, and fully to be completed and ended, by virtue of which said demise the plaintiff entered into the tenements aforesaid, with the appurtenances, and was thereof possessed until the 10th day of *April* now last past, when the defendant, with force and arms, entered into the tenements with the appurtenances, in and upon the possession of the plaintiff, and ejected, expelled and amoved the plaintiff from the possession aforesaid, his said term therein not being expired, and kept out, and still keeps out the plaintiff from his possession aforesaid, and then and there did other injuries to the plaintiff, against the peace, and to the damage of the plaintiff, 50*l.* lawful money, and to recover possession of the said messuage and tenements, with his said damages and just costs, the plaintiff brings suit. Writ dated *May* 29th, 1788. At which term comes the said *Darius Chipman*, and the said *Janna Churchill* by his attorney *Israel Smith*, and the said *Janna* entered into the common rule, and confessed the lease, entry and *ouster* in the plaintiff's declaration, and consented on the record to insist upon the title only under the general

issue by him to be hereafter pleaded, and craved leave to imparl, which was granted unto him by the Court, and the said cause was continued from term to term, until the term of the County Court holden at *Rutland*, within, &c. on the third *Tuesday* of *November*, 1792. At which term comes the plaintiff by his attornies *Daniel* and *Darius Chipman*, and the defendant by his attornies *Isaac Tichenor* and *Israel Smith*, and the defendant pleads that he is not guilty of the force and injury as has been complained of by the plaintiff, as in his declaration alleged, and thereof puts himself on the country for trial by his said attornies, and the plaintiff doth the like by his attornies; and a Jury of good and lawful freeholders of the County were impanelled and sworn to try the issue aforesaid, who on their oath say, that as to Lot No. 19. severed to the proprietary of *Joseph Purdy*, part and parcel of the tenements in the plaintiff's declaration described, the defendant is not guilty in manner and form as the plaintiff in his declaration hath alleged; and as to part of Lot No. 23. severed to the right of *John Moore*, part and parcel and residue of the premises described in the plaintiff's declaration, the Jury on their oath do say, that the defendant is guilty of the trespass and ejectment laid to his charge in manner and form as the plaintiff in his declaration hath alleged, and assess damages at one shilling. Whereupon it is considered by the Court, that the plaintiff recover of the defendant his term yet to come of that part and parcel of the lands described in the declaration, of which the defendant stands convict of the trespass and ejectment by verdict of the Jury, together with the said one shilling damages, and his

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costs. From which judgment the defendant moved for and was admitted to a review of said cause, to be heard and tried before us the Court at the next term of the same Court next to be holden at *Rutland*, within and for, &c. on the third *Tuesday* of *March*, 1793. At which term comes the plaintiff by his said attornies, and the defendant by his attorney *Cephas Smith*, who pleads and says, that as to Lot No. 20. severed to the proprietary right of *John Moore*, he confesses himself guilty, but as to the residue of the premises described in the plaintiff's declaration, to wit, that part and parcel of the premises severed to the proprietary right of *Joseph Purdy*, he says he is not guilty of the trespass and ejectment complained of in the plaintiff's plaint, and this he prays may be inquired of by the country, and the plaintiff doth the like by his attornies. Whereupon a Jury of good and lawful freeholders of said County were impanelled and sworn, who on their oath say, that the defendant is guilty of the trespass and ejectment complained of in manner and form as the plaintiff in his declaration hath alleged, as to Lot No. 20. in the declaration mentioned, and assess damages at sixpence, and for his costs. Whereupon it is considered by the Court here, that the plaintiff recover of the defendant his term yet to come in that part and parcel of the lands described in the declaration, to wit, that part and parcel of the premises of which the defendant stands here convict, by verdict of the Jury, of the trespass and ejectment whereof he may have possession, together with sixpence damages, and his costs taxed here by the Court at 69 dols. 17 cts. whereof he may have execution. Writ of possession issued 9th day of

April, 1799. All which being heard and read, the defendant demurs specially to the declaration. Joinder in demurrer.

And for causes of demurrer, the defendant takes the following exceptions:

First. That the judgment in the original action is void, because rendered virtually in favour of *James M'Gregor*, lessor of the plaintiff, as executor of *David M'Gregor*, deceased; executor having no right to maintain an action of ejectment for lands of which testate died seised.

Secondly. The execution was illegally issued, the judgment having been rendered *March* term, of the County Court, 1798, and the execution having issued *April* 15th, 1799, more than a year and a day after judgment rendered.

Thirdly. That *James Sawyer*, sheriff, is not in this case liable; but the liability, if any, is on the County of *Chittenden*.

Fourthly. That the nominal plaintiff in ejectment cannot maintain this action.

Fifthly. That provided the commitment was legal, *Janna Churchill* being committed to the gaol in *Chittenden* County by the sheriff of *Franklin* County, the sheriff of *Chittenden* County is not liable.

Cook, in support of the demurrer. This is an action brought by the nominal plaintiff in ejectment against the sheriff of *Chittenden* County, for the escape of *Janna Churchill*, the tenant in ejectment, from the gaol in that County, who was committed by the sheriff of *Franklin* County, upon an execution in

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favour of the nominal plaintiff; the record of which judgment is exhibited on *oyer*.

The first exception, that the original action was brought by a person not entitled to maintain such action, is well founded. *James M'Gregor*, as *executor* to *David M'Gregor*, was a stranger to the suit. The old maxim is, 'the land to the heir, and the chattels to the executor or administrator.' In some cases, the executor or administrator may stand in the shoes of the deceased, as on contracts; not so on torts. The judgment was rendered before the existence of the present statute, which enables the executor and administrator to maintain actions both on contracts and torts. The action of ejectment is a mixed action; when stripped of its legal fiction, the lessor of the plaintiff is the real plaintiff. It is observable, that in all the systematic books on the subject, under the head of who may bring such action, the person considered as capable of bringing it is always the lessor of the plaintiff. The nominal plaintiff is always considered as a fictitious being, representing by circumlocution the person of the real plaintiff, styled by fiction the lessor. Judgment in favour of the executor is not merely erroneous, but void. *Com. Dig.* vol. 1. p. 483, 484, 485. under the head, what action executor shall have.

Vermont Stat. vol. 1. p. 144. Act passed 10th March, 1797.

By common law, executors and administrators had no right to bring actions of tort in the name of the deceased. It is true the *English* statutes have in some cases cured this, but not as to ejectment.

In the State of *Connecticut*, executor may maintain an action on contracts, not on torts.

Swift's System, vol. 1. p. 429.

The statute which governed at the rendering this judgment empowered executors and administrators to maintain suits in the name of persons dying *pending* suits. The common law was left to govern as to the *bringing* actions, and they were not enabled to maintain such actions as they were precluded from instituting by the common law.

Harw. Ed. Vermont Stat. p. 275.

We shall cite a case decided in this Court, fresh within the memory of the bench: Plaintiff brought his action of trespass for burning a grist-mill, and died pending the suit. Administrator was suffered to prosecute under the statute read, in the name of the intestate. Verdict for the plaintiff. Motion in arrest of judgment, which prevailed, upon the principle that administrator could not maintain action upon tort in the name of the intestate.

Ibid.

We shall also notice the case of *Edson*, decided in *Windsor* County, where the plaintiff died pending the suit, and the executor came in to support the action in the name of the testate, and this Court decided, that the action did not survive because it was an action on tort.

The original judgment was therefore void, and not merely erroneous, which might have been rectified by a writ of error; and the sheriff, or, if he had been protected by his process, the plaintiff, would have been liable to an action for false imprisonment at the suit of *Janna Churchill.*

The second exception arises out of the record of the judgment, which is to be taken as part of the declaration, being proferted therein, and spread upon the record on *oyer.*

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No primary execution ought to be issued more than a year and a day after the judgment. There must be a chain of executions, an *alias*, *pluries*, &c. to keep the *judgment alive*. When a judgment is suffered to lie dormant six years after it is rendered, or any time beyond a year and a day, it lapses into a contract upon record, and must by *scire facias* be revived into a new judgment.

2 *Vin. Abr.* p. 125.
1 *Stra.* 399.

We might here notice the awkward manner in which the record of the final judgment in the County Court is made up. The defendant, it appears, pleaded not guilty as to part of the premises, and confessed himself guilty of the trespass and ejectment as to the residue. If we can learn any thing from the record, the verdict finds the defendant guilty of the trespass, &c. upon that section of the premises which was not in issue, and is silent as to that part which was solely under the consideration of the Jury. But as this may be imputed to clerical inaccuracy, and might possibly have been cured by writ of error, we shall not insist upon it in the present argument.

The third exception we shall blend and consider with the fifth.

The fourth exception states, that nominal plaintiff cannot maintain this action. In *Burrow's Reports*, vol. 2. p. 665. *Aslin* v. *Parkin*, it is held, that nominal plaintiff may maintain an action for mesne profits. It will be necessary to examine the principles which govern this case, and the ancient doctrines of ejectment. The action of ejectment was invented to get rid of the tedious delays caused by the bringing real actions. Anciently the demise was real, and the now nominal plaintiff a real sufferer; but the action

being found beneficial, it was continued to try title. But in *England* they are still obliged to adhere in some measure to the old forms, and have respect to those principles upon which the action was primarily introduced. But the action of ejectment introduced in this country has been held *in toto* fictitious. Indeed a late statute has stripped it of all its fictions. The doctrine held in *England* cannot therefore apply here. The nominal plaintiff cannot be considered here even as a trustee for his lessor, and there can be no doubt that here the *lessor* in ejectment may maintain an action for the mesne profits: but in *England* they are bound by precedents coeval with the action itself, and which their Courts suffered to foster a novel but beneficial action. In this government the reason of those precedents fail, and their authority with it. Here the nominal plaintiff is merely so. *John Doe* or *Richard Lackland* might as well have been inserted in the writ as *Darius Chipman*—this person *in esse*. In recovery had by *Doe* or *Lackland*, if execution issues in their names, and money is collected, to whom does it enure? who shall receipt the money to the sheriff when collected? In the present case, must the lessor be driven to the old doctrine of uses and trusts to recover it from this *real nominal* plaintiff? The lessor of the plaintiff must *respond* the costs if he fail in his suit, and why not bring his action to *receive* if he recover? The practice has been various in the several Counties in this State;- but it has been most usually practised in nonsuit on ejectment, for defendant to take out execution against the lessor: though in some Counties the defendant has taken out his execution for costs against the no-

Vermont Stat. vol. 1. p. 90.

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minal plaintiff, and obtained a mere formal *non est* to be returned upon it, and then brought a *scire facias* against the lessor, in which he was obliged to declare that he had caused the execution to be presented to the said *John Doe*, to be by him satisfied, *risum teneatis*. But in no case, where the name of some inhabitant of this State, of legal age, has been inserted in the writ as nominal plaintiff, has any writ of execution upon nonsuit, discontinuance, verdict, or failure of the lessor, been issued against that questionable heteroclite personage, a real nominal plaintiff. If judgment for costs in the original suit had gone the other way, and defendant had brought a suit against my brother *Chipman*, we should have heard him declare, that the *Darius Chipman*, nominal plaintiff, was a mere *John Doe;* a nominal fictitious being, and not *Darius Chipman*, the substantial suitor, who now sturdily demands our property.

Vermont Stat. vol. 1. p. 68.

The fifth exception, which includes the third, is founded on our own statutes. The 37th section of the judiciary act provides in substance, that when a sheriff of a County in which there is no legal gaol, holds an execution against a person residing within his bailiwick, he shall have power to commit such person to the gaol in some one of the nearest counties.

Ibid. p. 69.

In section 40th of the same act, it is enacted, " that in all cases wherein persons shall be committed to gaol under the directions of this act, who shall escape therefrom, the County from which such prisoner was sent shall be liable to pay all damages and costs to the person or persons who shall be injured by such escape."

And in confirmance of this, the act relating to gaols and gaolers, section 4th, enacts, "that the sheriffs of the several Counties in this State, shall be liable for all escapes made from the gaols in the Counties to which they severally belong, *excepting such prisoners as are committed from some other County.*" *Vermont* Stat. vol. 1. p. 280.

Here the statute is so express that it needs no comment. But further, in the proviso to the last cited section, it is provided, that when such sheriff shall make it appear that the escape was made through the insufficiency of the gaol, the County and not the sheriff, shall be liable. This applies to the third exception. Ibid.

And further, in a second proviso to the same section, it is enacted, "that when any action shall be brought against any sheriff for the escape of any prisoner, such sheriff may, on trial of the cause, produce evidence of the circumstances, situation and property of the prisoner when such escape was made, and all the circumstances attending such escape, and the creditor shall recover no more than his reasonable and just damages which he shall have sustained in consequence of such escape, and his legal costs." But it may be said, the question returns, what sheriff and County are here intended? Surely the sheriff and County wherein the debtor resided when arrested on the execution. In this case, the sheriff and County of *Franklin*, not the sheriff and County of *Chittenden*, for we have already seen that the 4th section of the act regulating gaols and gaolers, when establishing a liability in sheriffs for escapes, excepts the sheriff from any liability for the escape of such prisoners as may be committed from some other County. Ibid.

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Daniel Chipman, e contra. If all advanced by the defendant's counsel be true relating to the first and second exceptions in demurrer, advantage ought to have been taken in error, and not here. But it is observable, the first exception would not operate even in error; because by will executor may maintain ejectment, and to reverse the judgment it ought to be shewn, that executor can in no possible case maintain ejectment.

To the fourth exception, that the action cannot be maintained by the nominal plaintiff in ejectment, we observe, that it is true in actions of this kind a fictitious person is frequently introduced; but Judge *Blackstone* says it ought to be a real person. But if there be a real person, as in the present instance, the case cited from *Burrow* is in point, and puts it beyond all doubt. It shews that the action of ejectment may be brought each way; for in case of a *fictitious* plaintiff, the recovery is substantially for the lessor; when a *real* person, he recovers to the use of the lessor. The case of *Aslin* v. *Parkin* is not grounded merely on precedents, but is supported by the reason of the thing operating on all the Judges of *England.* That this mode of action is now put out of use by the late statute, can be no reason that a party should not have his remedy when pursued by existing laws.

Bl. Com. vol. 2. p. 202.

With respect to the third and fifth exceptions, that the sheriff of *Franklin* County is in this case liable, we reply, that the sheriff is liable at common law *for all escapes;* and this is affirmed by the 4th section of the act relating to gaols and gaolers, already read.

The argument that the sheriff or County of *Franklin* is liable, proves too much; for then the sheriff and County of *Chittenden* would in no case be liable for the escape of prisoners committed from a foreign County; for it must be admitted, that the statute imposes some liability on the sheriff or County where every commitment is made legally.

The 37th section of the Judiciary act, which empowers the sheriff of a County where there is no gaol, to commit prisoners to some gaol in another County, makes it absolutely "the duty of the keeper of the gaol to receive such person or persons, and commit or keep him, her or them, within said gaol." Here is a strong liability imposed by the statute upon the present defendant, sheriff of *Chittenden* County. To avoid this liability, it is necessary to shew that it has been done away by this or some other statute, or by some decision of this Court; which is not even attempted. *Vermont* Stat. vol. 1. p. 68.

Reliance is had upon the 4th section of the act relating to gaols and gaolers, which has an exception of persons committed from other Counties. This does not discharge the sheriff of *Chittenden* County from his general liability, and does not extend to *voluntary escapes*. If this were so in the case of *negligent escapes*, the County of *Franklin* or its sheriff must be always liable, let the conduct of the sheriff of *Chittenden*, or the laches of that County in neglecting to repair their gaol, be what they may. When a prisoner is committed from some other County to the gaol in *Chittenden* County, the sheriff may say, "In obedience to the statute I have received such prisoner, have committed and kept him within my

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gaol. Here the obligation of the statute ceases. I will admit the prisoner to the liberties of the prison yard. He may escape, but I am not liable; for this prisoner was committed from another county, and the 4th section of the statute relating to gaols and gaolers, which constitutes my liability, excepts prisoners of this description." This would be absurd.

As to what has been advanced respecting the sheriff's power to charge his County in case of insufficiency of the gaol, or that he may give the circumstances of the prisoner, &c. in evidence on trial for escape, we have not precluded the sheriff from such defence here, but he has waived this, and relied upon his exceptions in demurrer.

Israel Smith, on the same side. The clause "excepting such prisoners as are committed from some other County," in the 4th section of the act relating to gaols and gaolers, goes merely to change the liability of the Counties; and this is evident from a general view of all the statutes upon the subject: for if this exception is taken as absolute, there could be no bail-bonds taken in such case, or which would be valid if taken, which would deprive the citizen imprisoned of a right secured to him by the statute recited. This is a provision made in favour of personal convenience, though not in favour of entire liberty, to liberate prisoners from close, unnecessary, and often unwholesome confinement, and the merciful provision of the law ought to have its full effect. But upon the construction put upon the clause in exception above recited, the sheriff of *Chittenden* County might liberate all prisoners committed to his gaol

Vermont Stat. vol. 1. p. 283. s. 10.

from another County, or he might keep them in close confinement. The sheriff of *Franklin* County could not compel him to take bonds for the liberties of the gaol yard, or if sheriff of *Chittenden* County should be pleased to take such bonds, he might be careless as to the sufficiency of the bail, or by connivance with the prisoner accept bail merely nominal; for in no case, according to the present doctrine, would he be liable. Indeed it would go to saddle the sheriff of *Franklin* County with the debts of all persons he might commit to the gaol of a foreign County.

Besides, if the exceptions in demurrer are valid, they will go to get round the limitations of the writ of error. The act for the limitation of suits, &c. limits the bringing of such suits to one year after the rendering the judgment. This operates as to curing the defects in process; but if, as in the present case, any defects in process can be taken advantage of in demurrer to a suit grounded on such process, brought six years after the rendering such judgment, the defects are not cured, and the limitation of the writ of error is done away.

Vermont Stat. vol. 2 p. 409. s. 11.

Chauncey Langdon, for the demurrant. The exceptions in demurrer are reduced to four. I shall notice them with the observations of the opposing counsel in their order.

The principle advanced by Mr. *Chipman*, that the two first exceptions ought to have been taken advantage of in error, is not advanced with his usual correctness. Here they must shew a regular judgment. The distinction between a judgment that is *void* and that which is merely *voidable*, is clear. Errors under

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the last are *dehors* the record, may be rectified by writ, and cured by the statute of limitations; but that which renders a judgment in *itself* void can never be cured by any lapse of time. In this case the instituting the action in the name of a stranger made the judgment void in the outset, and the defendant in the original suit might undoubtedly have had his action of false imprisonment against the sheriff, and so he would have, until the statute of limitations ran against such action. Surely the right which the defendant had to bring such action, which is extended to three years, could not have been abridged by the statute of limitation having operated upon the writ of error; which might be said to have cured the defects of the judgment. I am willing to concede, that the lapse of the statute time for bringing writs of error cures many defects on the record; but it does not cure those which are intrinsic the record, and substantially wrong. The statute of limitation obstructing a writ of error does not take away essential rights. If so, plaintiff may obtain judgment upon default upon a contract, to which it appears, from his own shewing in his declaration, he is an absolute stranger, without giving notice to the other party. He may then take out his writ of execution within the year and a day, or take out *alias*, *pluries*, &c. procuring formal *non est* returns, to keep his judgment alive, or, as in the present case, suffer his judgment to lie dormant, and then, by a bolder stroke, take out his writ of execution, and, in the face of a court of justice, triumphantly exclaim, "all the defects in my judgment are cured: the limitation has run against any writ of error." But the Court and the law will reply to him,

your judgment was surreptitiously obtained, or to bring it nearer to the present case, there is a radical defect in your writ. It is apparent, from the face of the record, that you had no right to sustain your action; and although the writ of error is limited, yet whenever you attempt to avail yourself of this judgment in a court of justice, this radical defect shall be noticed.

The second exception, it is said, could not have operated even in error. The case is put of executor being capable of maintaining ejectment by will. The case is rare; but if so, it would be for them to shew such case, and themselves within it, not for us to except to what is not shewn.

In reply to the observation upon the third exception: It is true, that during the trial the nominal plaintiff and his lessor appear to have but one interest. The former in our practice is but another name for the latter; and in some Counties it has been the practice, after entering the common rule in ejectment, to strike the name of the nominal plaintiff from the docket, and to head the action with the name of the lessor; but when the cause is terminated, we surely ought to hear no more of this fictitious being. There happening to be a person *in esse* of similar name with the nominal plaintiff, cannot change the nature of the thing. The nominal plaintiff never had existence but upon paper, and this mere name can have no rights.

Allowing full force to the gentleman's arguments, it appears to me, from an investigation of the statutes upon the subject of the liability of the sheriff, who has prisoners committed to his gaol from another

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County, that the law has made no express provision which touches the present case. Many hard cases have been put, but no provision for them found in the statutes unless by a violent construction of them. If this was a *casus omissus*, it called perhaps for legislative interference. This Court have ample power to explain, but no power to amend the law. If the statutes have not made the sheriff of *Chittenden* County liable, it is not to the present purpose to inquire what sheriff or County is liable. It is sufficient, in the present case, that so much has been shewn as will fully exonerate our client.

Opinion of the Court.

The Chief Judge delivered the opinion of the Court. *Hall absente.*

The Court consider all the exceptions in demurrer to have been well taken.

Although executor may bring his action for an ejectment in the life of the testator, yet the *ouster* counted upon in the record spread before us, was subsequent to the decease of the testate, and the lease specified is made with the executor and not with the testate in his life-time, and by the existing laws the action should have been in the name of the heirs.

The Court likewise consider the execution, *Darius Chipman* v. *Janna Churchill*, to have been illegally issued; consequently the commitment under it is illegal, and the sheriff not responsible for any escape either negligent or voluntary.

The Court further consider, that the nominal plaintiff in ejectment cannot maintain this action. There has been great diversity of opinion in *England* upon the rights to be imputed to the nominal plaintiff in ejectment; and the practice in this State has neither been uniform or settled, but productive of endless embarrassment. To render the course of justice plain, the Legislature have very wisely, by a late statute, abolished this ancient mode of bringing ejectment, with all its fictions, and substituted a mode grounded upon the principles of the writ of assise of novel disseisin; a mode simple in its nature, which sets forth the plaintiff's claim with brevity and precision, enables the defendant to know and prepare his proper defence, and renders the subject in controversy readily reducible to legal issue without those tedious preparatives which encumbered the record in the former action. But the Court, in their decision on this point, are directed by the existing laws, which governed the prior action of ejectment. Under the old regimen it was the object of this Court to divest the action of ejectment of its fictions as far as was any wise consistent with the form of the action which had been directed by statute, to consider the nominal plaintiff as *merely* nominal, as giving a mere docket name to the suit. Therefore no action for mesne profits has ever been sustained in this name; and if it was used as plaintiff in execution, or in the writ of *habere facias possessionem*, it was merely introductory to the name of the lessor, and for his use. The lessor of the plaintiff was put into possession by the sheriff, and so he returned on the writ. He also governed the writ of execution, and by his receipt it might be

Vermont Stat. vol. 1. p. 195.

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discharged. If the execution issued against the nominal plaintiff, it was merely as a preparatory step to bring a writ of *scire facias* against the lessor.

In the present case, a writ of *scire facias* should have been brought upon the judgment in the name of the lessor, and it should have been *allegated*, that the lessor recovered the judgment in the name of the nominal plaintiff, and the *quare* should have been, to shew cause why an execution should not issue upon the judgment in his own name? and the Court would not have suffered the allegation to have been traversed. The maxim of the *English* civil code, "*ex fictione legis oritur jus*," must not be perverted to embarrass justice.

Sheriff, as keeper of the prison to which is committed a debtor from another county, not liable for a negligent escape.

There seems to be some difficulty in ascertaining the intention of the Legislature as to where the liability attaches in the case of a person arrested on execution in one County, and imprisoned in another. But upon a full investigation of all the statutes, it is the opinion of the Court, that the liability in this case does not attach to the sheriff of *Chittenden* County, the present defendant. Whether it attaches to the sheriff of *Franklin* County, may admit of some doubt.

It is therefore considered by the Court, that the declaration is insufficient, and that defendant have his costs.

Israel Smith and *Daniel Chipman*, for plaintiff.
Chauncey Langdon and *John Cook*, for defendant.

Hazen et ux. v. Smith and Caswell.

NEHEMIAH HAZEN *et Ux.* Appellees,

against

PETER SMITH and JOSIAH CASWELL, Appellants.

Debt on recognisance entered by private informer *upon motion and order for new bail* before a justice holding court of inquiry, will not lie under the statute of 1787.

DEBT on recognisance entered by private informer in pursuance of an order of a Justice holding a Court of Inquiry.

Attach *Peter Smith* and *Josiah Caswell* to answer unto *Nehemiah Hazen* and *Miriam* his wife, in a plea of debt, that they render to the said *Nehemiah* and *Miriam* 1,000 dollars, which they justly owe and unjustly detain, for this, to wit: that whereas the said *Peter Smith*, on the 11th day of *September*, in the year of our Lord 1797, at *Middletown*, in the County of *Rutland*, prayed out a warrant against the said *Miriam* and one *Jacob Harrington*, on the complaint of the said *Peter*—[*Here follows a charge of adultery against Miriam and Jacob Harrington.*] Said *Harrington*, who was at that time the husband of another woman, and the said *Miriam* not being the wife of the said *Harrington*, but the lawful wedded wife of another man, against the form, force and effect of the statute in such case made and provided, &c. which said warrant, so made out by the said *Peter* as aforesaid, upon the complaint aforesaid, was signed by and made returnable before *Edmund Bigelow*, Esquire, one of the Justices of the Peace within and for the County of *Rutland*, having sufficient power and authority to issue the same; upon which said warrant the said *Miriam* and the said *Jacob* were duly arrested and brought before said *Edmund Bigelow*, Justice of

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the Peace as aforesaid, on the same 11th day of *September*, 1797, to answer unto the complaint of the said *Peter*, so exhibited as aforesaid against them the said *Miriam* and *Jacob*, and the said *Miriam* and *Jacob* then and there objected against the bail of the said *Peter*, which he had heretofore entered before said Justice for the prosecution of the complaint as aforesaid, as being insufficient to secure the costs which might enure to them in case the said *Peter* failed to prosecute his said complaint to effect. Whereupon it was then and there ordered and adjudged by said Justice, that the said *Peter Smith* should procure and enter further bail to secure the costs to the said *Miriam* and *Jacob* in that behalf; and the said *Peter Smith* and *Josiah Caswell* then and there personally appeared before said Justice, and acknowledged themselves jointly and severally indebted and recognised to the said *Miriam* and *Jacob* in the sum of 1,000 dollars in due form of law, conditioned that the said *Peter* should prosecute his said complaint so made to the said Justice as aforesaid, against the said *Miriam* and *Jacob*, and to pay all costs and damages in case he did not support and prosecute the same to effect, as by the records of the said Justice, ready in Court to be shewn, may fully appear. Whereupon the said Justice proceeded to hear said cause upon the complaint of the said *Peter* so exhibited against them the said *Miriam* and *Jacob* as aforesaid, and upon hearing the same, ordered and adjudged that the said *Miriam* should be bound in a bond of recognisance with sureties in the sum of 333 dols. 33 cts. conditioned for the appearance of the said *Miriam* before the Supreme Court of

Judicature then next to be holden at *Rutland*, within and for the County of *Rutland*, on the *Tuesday* next following the fourth *Tuesday* of *January* then next, then and there to answer unto the complaint of the said *Peter* so exhibited as aforesaid, and abide the order of the said Supreme Court thereon, as by the records and proceedings of said Justice may more fully appear; with which order of the said Justice the said *Miriam* then and there complied; and the said *Miriam* did accordingly appear at and before the Supreme Court of Judicature holden at *Rutland*, &c. on the *Tuesday* next following the fourth *Tuesday* of *January*, 1798, according to the tenor of said bond of recognisance; and did then and there, before said Supreme Court, answer to the complaint of the said *Peter* as aforesaid, and also to an indictment for the causes and matters in the said *Peter's* complaint contained, preferred to said Court by the Grand Jurors of said County, before said Court then and there duly impanelled, sworn and charged, and was then and there, by the verdict of the Petit Jury, on trial of the charges in said indictment, found not guilty of the matters and things whereof she stood complained and indicted as aforesaid; and the said Supreme Court did thereupon order and adjudge, that the said *Miriam* should be discharged from her said bonds of recognisance, and go without day for ever exonerated and acquitted from all and all manner of crimes and delinquencies alleged against her in said complaint and indictment. Wherefore the said *Peter* did not prosecute his said complaint to effect, and the said *Nehemiah* and *Miriam* say that they have been put to great costs and expense in defending against

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the complaint of the said *Peter*, so commenced and prosecuted by the said *Peter* against the said *Miriam* as aforesaid; and that the said *Peter* or the said *Josiah*, or either of them, have not paid to the said *Nehemiah* and *Miriam*, or either of them, their just costs and damages by them sustained in that behalf. Whereby and by reason of the premises, the said *Nehemiah* and *Miriam* say, that the said recognisance so entered into by the said *Peter* and *Josiah* as aforesaid, conditioned to support and prosecute said complaint to effect in manner and form as aforesaid, is become forfeited and due to the said *Nehemiah* and *Miriam*, and an action hath accrued to them the said *Nehemiah* and *Miriam*, to demand and have of the said *Peter* and *Josiah* the said sum of 1,000 dollars, contained in said bond of recognisance; yet the said *Peter* and *Josiah*, or either of them, have not paid, &c. but detain it, *ad damnum*, 100 dollars.

To this declaration the defendants demurred specially. Plaintiffs joined. Defendants took the following exceptions to the declaration:

First. That the declaration does not set forth that *Miriam* was the wife of *Nehemiah Hazen* at the period of the commencement of the present action, or that her present husband *Nehemiah* was any ways liable to any damages she may have sustained.

Secondly. That the recognisance set forth in the declaration was taken at the Court of Inquiry, and not at the commencement of the process; that the Justice had no authority at such time to take such recognisance.

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Thirdly. That the recognisance was taken *jointly* to her and *Jacob Harrington*, who is not joined in the present action.

Fourthly. That it appears, from the face of the declaration, that the defendant *Peter Smith* did in fact prosecute his complaint to effect.

John Cook, for defendants, in support of the demurrer. The principle of law is, that the declaration is to be taken strongly against him who makes it.

This declaration does not set forth that the plaintiff *Miriam* was the wife of the plaintiff *Nehemiah*, but in the language of the declaration she may be the wife of some other person. This exception is not trivial. The declaration is at least uncertain. If there is any right of action in the plaintiff *Nehemiah*, it must accrue from his intermarriage with *Miriam*, the obligee in the recognisance declared upon; and this being the foundation of his right of action, ought not to be taken by intendment, but should have been substantially set forth. In all cases where the *baron* prosecutes in right of the *feme*, the demand is first set forth as existing in the woman *dum sola;* and then the intermarriage is formally set forth, and the right to join in the action declared to have accrued to him by the coverture.

Under the second exception, we observe, that all the authority given by law to Justices of the Peace to take recognisances in criminal prosecutions *at the time of taking this recognisance*, which was before the late law passed, is given by the statute passed *March* 3d, 1787, entitled, an act concerning sureties and *scire facias*, since repealed. All the power given by

Harw. ed. *Vermont* Stat. p. 170.

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this statute to the Justice, is contained in the following clause: "that no special warrant to apprehend any person shall be granted by any magistrate before the person praying out such warrant has given sufficient surety or sureties by way of recognisance to the person complained of, that such person requesting the warrant will prosecute his complaint to effect, and answer all damages if he does not support it." Here all the authority given to the Justice is to take a recognisance to the person complained of, and it is directed to be done before the issuing or praying out of the warrant. There was bail for prosecution taken agreeably to this statute. The Justice was then *functus officio*. He had exercised his judgment, and had taken bail to his own acceptance. This bail was excepted to by the delinquents; and then the magistrate, without law, proceeded to order and take the present recognisance. Even the new statute does not provide for this case, that contemplating merely a case where adjournment of the court of examination may be necessary, and providing only for the taking recognisances of the parties or witnesses to the treasurer of the town, county, or state, to which a fine would be payable on conviction. At no time did the power to take the recognisance in question exist in a single magistrate. All the powers of the Justices of Peace in this State relative to the taking of bail, are given by statute. The Justices themselves are creatures of the statute law, and must be controlled by it.

Vermont Stat. vol. 1. p. 176. s. 20.

In support of the third exception, we shall read *Viner's Abridgment*, vol. 2. p. 57. and a note upon the second section. *A. B.* and *C.* take bond, broken as

to *A.* who brings suit, and in Exchequer judgment of Common Pleas reversed.

Mr. *Cook* here read several other cases from *Viner*, and the *note, section* 15. *which he insisted were in point*, and proceeded—

In the present case, they have not shewn what became of *Jacob Harrington*, the co-recognisee, or why he is not joined in the action. Did no action accrue to him, or has he forfeited his right? If so, let it be expressed. Is he deceased? where are his executors or administrators? Certainly, from the authorities read, *Miriam* is without remedy, unless *Harrington* is joined, or some sufficient reason shewn upon the record why he is not joined.

In *Viner's Abridgment*, vol. 14. p. 469, 470. title Joint and Several, we are taught, that when the words of the covenant are several, obligees may sever in the action. Here it is not stated in the declaration, that this recognisance was taken *severally* to the recognisees. We anticipate that the case of the *Four Fiddlers*, in the 2d vol. of *Viner's Abridgment*, may be attempted to be enforced as an authority against us. But we observe, that the decisions of the higher Courts upon solemn argument, are alone to be relied upon as settled cases, and not those of the inferior courts, which are merely acquiesced in.

In support of the fourth exception. It is manifest that the statute contemplates by the expression, "*prosecuting to effect*," all that a person is bound by legal duty to do in such prosecution. Here a complaint was entered, and well supported and prosecuted to effect before the Justice who ordered the respondents to procure bail for their appearance before the

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Supreme Court to answer to the charges exhibited in the complaint, and this was *all the duty required by law* of the complainant. In the whole career of prosecution, from this to the conviction and punishment, there was nothing further for the complainant, of his own personal exertion, to do. If the magistrate had omitted to return the recognisance for the appearance of the respondent at Court, it was not the duty of the complainant to call him to account for his neglect. If the respondents or witnesses for the State failed to appear, the complainant could not take the forfeiture of their recognisances. It appears there was an indictment found by the Grand Jury, exhibiting the same charges as in the complaint set forth. The complainant could not accelerate the trial, or enter a *nolle prosequi*. The whole was in the hands of the State Attorney, who could control the prosecution in any stage. When the complainant had prosecuted his complaint before the Justice, and had procured the respondents to be recognised to appear before the Supreme Court to answer to the charges exhibited by him in his complaint, he had *prosecuted to effect*. If he had failed to effect this, he would have been liable, under the recognisance, to answer all such damages as had then arisen; but having supported his complaint so far, he had done all the duty required of him by the law, and had prosecuted to effect, according to the true intent and meaning of the condition of the recognisance.

Daniel Chipman, e contra. As to the first exception, it is totally immaterial whether *Miriam* was sole or the wife of another at the time of taking the

recognisance. It was taken for her benefit, and enured to her as a personal right; and the only question is, is this action well planted, as brought in the names of the husband and wife? for they are set forth as such in the writ; a question which it would be a reflection upon the Court to agitate.

In reply to the second exception. To determine whether this recognisance was legally taken, we must advert to the powers of all Courts. It will be found, that when any Court is empowered by statute to do a particular act, there is a power incident to the Court to conduct the business with such practical variations in the mode as to carry the design of the statute completely into effect, that substantial justice may be done, and the rights of the citizen not sacrificed to mere form. Here the Justice of the Peace is authorised by the statute, before the issuing of the process, to take recognisance for costs and damages, to be paid to the respondent by complainant in case he should fail to support his complaint. Here the law stops. Question then arises, whether, the bail failing, the Court had power to order other or better bail. The only correct determination on the subject is, that all Courts have incident to them such power. The Justice, it is true, ought to have staid proceedings until the order for better bail was complied with. What would have been the consequence if complainant had refused to enter better bail, is now immaterial. Here the recognisors complied voluntarily, and the recognisance is binding.

We contend that the power to take recognisances of the nature of the one in question, is expressly given by the statute of 1797, alluded to by the gen-

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tleman preceding me. But if the Justices of the Peace have now such power given by this statute, *non constat* that the power did not exist in them before. Statutes are frequently made in affirmance of the common law. Justices of the Peace are ancient officers, and, as conservators of the peace, possess many common law prerogatives; and the power given to them by the new statute is without doubt but in affirmance of the same power originally possessed by them at common law.

Upon the third exception we remark, that the reason of the case will dictate, that when any person or persons are bound by specialty to two or more, and the things covenanted for may be *separately* injurious, the law must intend that a separate action may be brought by him who is separately injured, or the recognisance is defeated.

The case in *Viner's Abridgment*, first read, does not apply; that savouring of a real action on joint-tenancy. The reason of the thing shewed that the obligees ought not to be separated. It would increase suits. The interest was joint.

In the case next cited, *A.* covenanted with *B.* and *C.* that he would not farm the excise of beer in *Cornwall.* *B.* was injured, and brought separate action. The Court held here was *no joint interest*, and each might have his separate remedy.

In the present case, to apply the principle, was there any joint interest? An acquittal of one would not have discharged the other. If one had discharged this recognisance, it would not have operated a discharge as to the other, because *Miriam* and *Harrington* had separate interests, and might be se-

parately damaged. The whole course of judicial proceedings shew, that these recognisances, with several recognisees, are common; and the principle stated and supported by the books, has ever governed actions brought upon them.

As to the fourth exception. The law has pointed out certain officers to make complaint in criminal matters, and it has also authorised individuals to make such complaints, but they are holden for costs and damages. If the course taken by the Justice was irregular, which is not admitted, the recognisance shall still hold for costs. This arises from the very nature of the transaction. The meaning of the words of the statute, "prosecuting to effect," is clear. This term is well understood in civil process. When a person recognises upon the issuing of a writ returnable to the County Court to *prosecute to effect*, here, if the recognisor fails at any time before the action is before the Supreme Court, he shall respond the costs in suit upon the recognisance. And so on an action for malicious prosecution, which prosecution was commenced by process for examination before a Justice of the Peace; the injured party recognised to appear at the Supreme Court, and indictment there found, though the binding over is the act of the Justice, and the indictment the act of the Grand Jury, and the latter under the control of the prosecuting officer of government, yet upon acquittal the action will well lie; and the complainant shall not screen himself by saying, the proceedings of the Justice, or even the indictment itself, have sanctioned my doings.

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Chauncey Langdon, on the same side. I shall only notice the third exception. If the doctrine laid down by my brother *Chipman* be not true, great injury will ensue. If both persons to whom this recognisance was taken are compelled to join in the action, one may have been put to greater costs, and received greater damage than the other. How shall the damages be severed? The first judgment must be for the penalty. Shall there, in such case, be several motions to Chancery? Therefore it has been wisely determined, that where the injury may be several, the remedy may be so.

Mr. *Cook* has misunderstood the note in *Viner's Abridgment*. It is not the reverse of the case in the text. All the cases cited by him first in order, which go to shew that persons united in the same specialty must prosecute jointly, respect freehold property holden in joint-tenancy, in which the principal, interests, and every thing growing out of them, have ever been considered as inseparable. In 2 *Mod.* p. 82. the case in *Viner's Abridgment* respecting the farming the excise of beer, *Wilkinson* v. *Sir Richard Lloyd*, is more fully stated, and shews more fully that it is in point. Is there any thing in the present recognisance which shews it to be of the nature of a joint contract. Here complaint was entered against *two;* both recognised to appear at the Supreme Court; both indicted; one, to wit, *Miriam Hazen*, acquitted by the Jury. The other's bond was estreated. In every view of the subject, the rights of *Jacob Harrington* were never confounded with ours.

——, for the demurrant. The authorities cited are before the Court. I shall submit the first and two last exceptions in demurrer to their consideration, with the *coercive* observations of my brother *Cook*, and shall detain the Court with a few observations upon the second exception. There is manifestly a distinction between recognisances taken by a Justice in criminal and civil suits, and between those of the former where the Justice has jurisdiction of the offence, so as to try the issue, and those where he holds merely a Court of Inquiry. If the Justice takes a recognisance, though not particularly provided by statute, but within the spirit of it, in a cause within his jurisdiction to try, such recognisance will, on the quashing of the complaint, compel the payment of costs. But when the Justice holds a Court of Inquiry, every such recognisance then taken must be within the letter of the statute. The magistrate may be considered to have a power to control with some latitude those things which pertain to the administration of justice in his own Court; and here he may construe, enlarge or restrict those statutes relative to trials in his own Court, giving to such statutes in the exercise of his judicial power, such construction as to his wisdom may seem meet. But the object of a Court of Inquiry is not to try. No issue is joined. The magistrate is merely to discharge or bind over the accused to a superior Court; and the bonds taken are to be sent by him to such Court, and become part, not of his records, but of those of the Court to which they are sent. The Justice, in this case, acts not judicially but ministerially. His duty, then, in all motions for recognisances in his Court

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of Inquiry, is to look to the plain letter of the statute, and, if the bonds required are not noticed therein, to consider that he has no power to take them. Surely the magistrate could find neither in the letter or the spirit of the existing statute, a power to take the present recognisance. But conceding that he had, is the recognisance forfeited? Have we not prosecuted to effect? Does the law require of a man to do what he cannot do legally? When we had exhibited sufficient evidence before the Court of Inquiry to obtain bonds for the appearance of the delinquents before the Supreme Court, what could we have done more legally? Did the law require of us, that we should conduct the witnesses for the prosecution to the Court? This was not required, for the statute had provided, that the witnesses should themselves recognise for their appearance. Were we to fee counsel to aid in the prosecution? The law had provided an attorney for the State. Was it required that we should control, enlighten, and indoctrinate the public prosecutor. Might not the State Attorney, in the form of the indictment laid before the Grand Jury, have altered our charges in the complaint, so as to have excluded some essential part of the evidence? might not the indictment have been brought at common instead of on the statute law? Might not the attorney, although I confess it is not presumable when I consider the abilities of the gentleman who then prosecuted for the government, might not he, through the press of public functions, have drawn for the first time a defective indictment, which might have been quashed in arrest of judgment. Must my client be responsible for any or all these failures? If

they happened, could it be said they resulted from his *not prosecuting to effect?* How then can any act after the Justice had ordered the delinquents to be bound over, be considered as comprehended within the clause, or made part of the conditions of the recognisance?

But let us examine the intent of the conditions of the recognisance. It is said, that ignorance of the law excuseth no man; but still laws ought to be so worded and so construed as to meet the general understanding of the people. Common informers are considered as doing a beneficial service to the State. They are provided for by the common and statute law, and stimulated to activity by the latter. What duty would a common informer conceive to be enjoined upon him by this condition of the recognisance? Would he conclude, that in the laudable act of bringing offenders to justice, he was bound merely to support his complaint before the Court of Inquiry? or would he, *could* he imagine, that he was to render himself responsible for the acts of others over whom he had no control, and for those various laches, by which criminals elude justice? Would he consider that he was responsible merely for those trivial costs which might attend a Court of Inquiry in his neighbourhood, which might be commensurate with his purse, or those possible costs and damages which might result from the failure of conviction at a distant Court, which might absolutely ruin him?

To shew that the responsibility of the recognisors attached to the proceedings in the Supreme Court, some analogy is attempted to be shewn betwixt this case and that of an action brought for a malicious pro-

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secution, stated to be commenced before a Court of Inquiry, with acquittal in the Supreme Court. To sustain such action, express malice must be shewn, or strongly implied in the malicious *prosecutors;* for the action must be brought in the nature of a writ of conspiracy, and against more than one; and malice being proved in the commencement of the process before the Court of Inquiry, all subsequent proceedings in the course of prosecution in the Supreme Court are legally considered to have arisen from it, and fairly imputable to the primary agents. But can express malice be shewn, or malice even implied in an action of debt on recognisance? The Justice's authority to take this recognisance has been considered in the argument as one of those variations from the express letter of the statute, which he had an inherent power, by virtue of his office, to do, for the purpose of carrying the principal intent of the statute into effect. If it were conceded, that the magistrate possessed the power so to construe the statute as to effect that which he might imagine to be its intent; would it follow, that he would have power to add such clauses and provisions to the statute as he in the profundity of his legal science might imagine that the Legislature should have supplied.

The only recognisance for costs of prosecution which the magistrate issuing process upon complaint, is clearly designated by the statute. It shall be entered into at the time of the praying out the warrant. Whatsoever was done by the Justice afterwards, and with however honest intentions, relative to taking any after recognisance, was an officious intermeddling;

not warranted by the statute, and therefore nugatory and void.

Opinion of the Court.

The Chief Judge delivered the opinion of the Court.

The Court consider, that the Justice of the Peace had no power, under the statute of 1787, on motion for new bail, to take the recognisance declared upon. The second exception in demurrer being well taken, in the united opinion of the Judges, and going to the cause of action, the Court waive any opinion upon the other points.

Let judgment be entered, that the plaintiffs' declaration is *insufficient*, and that defendants have their costs.*

Daniel Chipman and *Chauncey Langdon*, for plaintiffs.

—— —— and *John Cook*, for defendants.

* *Vide* further report of this cause on reserve—*Rutland* County, *July* adjourned term, A. D. 1802. *Vide* names of cases.

Atkinson v. Minor et al.

JOHN ATKINSON, Appellant,

against

JOEL MINOR *et al.* Trustees of MOSES HADLEY, Appellees.

Several trustees with distinct interests cannot be joined in the same writ.

MOTION TO DISMISS. In the declaration, plaintiff set forth, that the said *Joel Minor*, *Ephraim Carr*, and *Wait Rathborn*, have in their possession money, goods, chattels, rights or credits of the said *Moses Hadley*, an absconding debtor, to the value of 500 dollars.

The trustees filed the following motion:

RUTLAND COUNTY,
Supreme Court, &c.

John Atkinson v. *Joel Minor*, &c.

Now the said trustees here in Court *severally* move the Court, that the process of the said *John Atkinson* against them as trustees as aforesaid, be dismissed—

Because they *severally* say, that the trustees are *joined* in the action aforesaid, and they as such are charged jointly with having in their possession money, goods, chattels, rights or credits of the said *Moses Hadley*, to the value of 500 dollars. And for that they the said trustees are not and never have been *joint traders* or partners in company, and have not at any time been *jointly* possessed of any money, goods, chattels, rights or credits of the said *Moses Hadley*, or in any way have been *jointly* indebted to

the said *Moses Hadley* in any sum whatsoever: Therefore they severally pray the judgment of the Honourable Court, that the process aforesaid may be dismissed, and they severally allowed their costs.

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By *Cephas Smith*, junior.

To this motion there was a demurrer and joinder.

Cephas Smith, junior, for the trustees, contended, that the words of the statute, "*person or persons*," "*trustee or trustees*," "*his, her, or their*," mean to distinguish those who are *severally* and jointly possessed of monies, goods, &c. of the absconding debtor. The word "*possession*" being used throughout the statute, as applied to the plural number, must intend the *joint* possession, and not *several*. Any other construction will be absurd; for upon a return of *nulla bona* upon the first writ of execution which issues against the goods of the absconding debtor in their possession, the *sci. fa.* must issue jointly against all, which cannot be. And if writ of execution should then issue *de bonis proprtis*, though the trustees may each possess several and unequal sums of money of the property of the absconding debtor, yet the trustees being joint debtors in the execution, each one would be liable for the whole amount.

Vermont Stat. vol. 1. p. 341.

The creditor of an absconding debtor cannot have a greater right against the debtors, or trustees of the absconding debtor, than he originally possessed himself. The absconding debtor had not, at common law, a joint action against his several debtors, but separate actions. The fair construction of the statute is a *joint* interest in the trustees. Trustees *vi termini* means corporate bodies created by law, or those

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minor corporations, if we may so term them, created occasionally by contracts, as the obligees in a specialty, or promissors in a note—a joint connection. The goods, &c. of the absconding debtor in the possession of such, were liable to be reached by the trustee process; and therefore the word "*trustees*" was necessarily inserted in the statute.

It is obvious that the Legislature did not contemplate the joinder of several trustees with distinct interests in the same writ; for the statute has made no provision for *separate judgments*. Indeed none were necessary. But if several trustees of the absconding debtor may be joined in one action, it would operate infinite embarrassment in the collection of debts. A creditor might summon fifty or more persons as trustees of an absconding or concealed debtor; and upon service of the process, if any one of them responded to the absconding debtor, it would be at his risk, and often very nice questions would arise, whether trustee or not, not readily determined, even by professional men. Thus, in this mode of bringing the action, a small demand due to the plaintiff might impede the collection of numerous debts.

Statutes creating novel rights ought always to be strictly construed. The common law regulations are ever to be pursued, if not expressly altered by the statute.

Truman Squires, contra. That they had pursued the statute strictly, in bringing the present action.

The words of the first section give the right to this mode of bringing the action expressly. "If any person *or persons* shall have goods," &c. in his, her

or *their* "possession of any person who shall have secretly absconded from the State, or shall keep concealed within the same," any creditor may cause such person or *persons* to be summoned as trustee or *trustees* of, &c. by a process to be issued against him, her, or *them*. The second section speaks the same language: "If the said trustee or *trustees* do not appear by himself, herself, or *themselves*." And similar expressions are continued through the whole statute.

But it is said the plural is used to denote corporate bodies, or persons jointly interested by contract in the goods, &c. of the absconding debtor. But if so, why was it not thus expressed. Perhaps there are no words more frequently inserted in statutes than person and persons: but surely no one ever before imagined, that *persons* or *trustees*, or any other plural *vi termini*, meant a joint interest. When a joint interest is intended by the plural in any statute, we learn it from its connection with and relation to other parts of the statute, or by its consistency with the great object of it, which is often expressed in the preamble, and frequently in the very title of the act. But on investigation of the present statute, can we learn from any other expressions in it, that "*persons*" or "*trustees*" meant to intend a joint interest. Does the great object of the statute run counter to our construction of it? The very title of the act is, "An act directing the mode of process against *trustees*" of absconding debtors.

It is objected, that our construction of the act will create embarrassment in the process of *sci. fa.* and writ of execution *de bonis propriis*. But was there

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ever a new law promulgated which did not present some difficulties in the detail of practice under it? It is the great and constant object of Courts of Justice to remedy these difficulties, and by their practical rules and repeated decisions, to render the operation of the act intelligible and consistent; and we have no doubt that the decisions and rules of this Court will in due time dissipate the dense cloud of obscurity which at present shrouds the gentleman's mind. What will be these decisions and rules we do not presume to anticipate. For ourselves we can conceive of no difficulty in case of return of *nulla bona* on the first execution, for the creditor to enter several motions for *sci. fa.* against the several trustees. It is incumbent on each trustee to disclose, and when the creditor's debt is satisfied by the property in the possession of one, two, or more of the trustees, he cannot have more; and the officer's returns on the several executions of the several sums collected, when amounting to the creditor's principal judgment debt, will be a bar to any *scire facias* against others.

But it is said the creditor of an absconding debtor cannot have a greater right against the debtors or trustees of an absconding debtor, than he had himself. By common law he might not. But surely the Legislature have a power to restrict, destroy, or abridge municipal rights. Do they not convene for these purposes? What is our statute book but a volume which in every page limits, abridges, abolishes, creates, destroys, and then creates anew municipal rights. But an alarming evil is apprehended from our construction of the statute. It is said, if several trustees of the absconding debtor may be joined in

one action, it would operate infinite embarrassment in the collection of debts. But would this evil be entirely done away by *their* construction? Might not a debt of twenty shillings clog a debt of a thousand pounds? Might not a creditor holding several demands bring separate trustee processes against many trustees, though his several demands may each be small in comparison with the goods, &c. in the possession of each trustee.

In the respectable State of *Connecticut* they find no inconvenience or difficulty in *copying*, as they style it, several garnishees. The great object of our statute is to prevent the embezzlement of property of absconding or concealed debtors, and to secure it to respond their just debts. That this can be effected better by one action embracing several trustees, than by several actions, admits of no doubt when we consider the great saving of costs which will be made by the former mode.

Daniel Chipman arose to reply.

Sed per Curiam. The Court do not wish to hear further in support of the motion. The statute is so clear, it would be a waste of time to hear further argument.

The Legislature, it is apparent, never contemplated an action like the present under this statute.

To embrace persons of several interests in one suit as creditors of an absconding debtor, would produce great injury to the parties, and occasion much embarrassment in the process of the Courts.

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Let the process be dismissed, and the trustees have severally their costs.

Daniel Chipman and *Cephas Smith*, junior, for the trustees.

Israel Smith and *Truman Squires*, for plaintiff.

CHALKLEY JAMES, Appellee,
against
SIMEON SMITH, Appellant.

In debt upon a recognisance to prosecute writ of error taken under the statute of 1791, where execution upon nonsuit and complaint has issued and been returned satisfied for 12 per cent. interest and costs, the Court will chancer the penalty to a sum merely nominal.

DEBT on recognisance.

Attach *Simeon Smith* to answer to *Chalkley James*, surviving partner of *Roger Hunt*, deceased, in a plea, &c. that he the said *Simeon* to the said *Chalkley* as surviving partner to the said *Roger Hunt*, render the sum of 1,400 dollars, which he justly owes, &c. for that whereas the said *Simeon*, in the life-time of the said *Roger*, to wit, on the 9th day of *February*, 1798, in his own proper person appearing before *Enoch Woodbridge*, Esquire, one of the Judges of the Supreme Court of Judicature of the State of *Vermont*, acknowledged himself indebted to the said *Chalkley* and *Roger* in the sum of 1,400 dollars, to be paid to the said *Chalkley* and *Roger*, their heirs, &c. and unless he should so do, he the said *Simeon* did grant and agree that the said sum of 1,400 dollars should be levied of his goods and chattels, lands and tenements, and for want thereof upon his body to the use

of the said *Chalkley* and *Roger*, (he the said *Enoch Woodbridge*, Esquire, by virtue of his office as Judge of the said Supreme Court of Judicature as aforesaid, being legally empowered to take such bond of recognisance,) which said bond of recognisance was nevertheless conditioned, that if *Nathaniel Dickinson* should prosecute to effect at the Supreme Court to be holden at *Rutland*, within, &c. on the *Tuesday* next following the first *Tuesday* of *January*, 1799, a certain writ of error by him prayed out, and bearing date on the same 9th day of *February*, 1798, wherein the said *Nathaniel* was plaintiff, and the said *Chalkley* and *Roger* defendants, on a judgment had and rendered in the County Court of the County of *Rutland*, at their term of *November*, 1797, in favour of the said *Chalkley* and *Roger*, for the sum of 703 dols. 38 cts. damages, and 14 dols. 41 cts. for their costs in that behalf laid out and expended, and should pay and satisfy to the said *Chalkley* and *Roger the full amount of the judgment aforesaid*, provided said judgment should be affirmed by said Supreme Court, and answer and pay all intervening damages and costs, and such damages and costs as should be awarded by said Court to the said *Chalkley* and *Roger* for the delay of the writ of execution on said judgment by pretext of prosecuting said writ of error, in case said *Nathaniel* should fail to prosecute the same to effect, then said bond of recognisance to be void, otherwise to remain in full force and effect, as by said bond of recognisance, and the conditions thereof ready here in Court to be shewn, may more fully appear. And the said *Chalkley James* says, that afterwards, to wit, at the

James v. Smith.

Supreme Court begun and holden at *Rutland*, within, &c. on the *Tuesday* next following the fourth *Tuesday* of *January*, 1799, and after the decease of the said *Roger*, such proceedings were then and there had on the said writ of error, that said judgment was duly affirmed; and it was by the consideration of said Court adjudged and determined, that the said *Chalkley James*, as surviving defendant and surviving partner of the company and firm of merchants, known by the name and firm of *James* and *Hunt*, should recover of the said *Nathaniel* the sum of 7 dols. 25 cts. for the costs which he had sustained by reason of the prosecuting the said writ of error as by the files and records of said Supreme Court here before them had may fully appear. And the said *Chalkley*, surviving partner as aforesaid, further says, that said *Nathaniel* hath not prosecuted his said writ of error to effect, and hath not paid and satisfied to him the said *Chalkley* since the decease of the said *Roger*, nor to him the said *Roger* before his decease, the amount of said judgment had and rendered in the County Court as aforesaid, and has not answered and paid *all intervening damages* and costs occasioned by prosecuting said writ of error, nor any part thereof; and the said bond of recognisance, in form aforesaid, remains in full force and effect, and hath become forfeited to the said *Chalkley*, whereby an action hath accrued to the said *Chalkley*, as surviving partner as aforesaid, to have and recover of the said *Simeon* the said sum of 1,400 dollars as above demanded, yet the said *Simeon*, having due notice of the premises, hath not paid said sum of 1,400 dollars to either the said

Chalkley or the said *Roger* in his life-time, but detains it, *ad damnum*, 2,000 dollars. James v. Smith.

This cause came by appeal from the County Court.

Chauncey Langdon, for defendant, craved *oyer* of the bond of recognisance, which was exhibited, and then suffered a default.

The bond read in oyer.

State of *Vermont*.

Rutland, *ss*. Be it remembered, that before me, *Enoch Woodbridge*, one of the Judges of the Supreme Court of Judicature of the State of *Vermont*, came personally *Simeon Smith*, of, &c. and acknowledged himself justly indebted to *Chalkley James* and *Roger Hunt*, merchants trading in company under the name and firm of *James & Hunt*, in the full and just sum of fourteen hundred dollars, to be levied of his goods and chattels, lands and tenements, and for want thereof upon his body, if default be made in the conditions following: The condition of this recognisance is however such, that if *Nathaniel Dickinson* shall prosecute to effect at the Supreme Court to be holden at *Rutland*, &c. on the *Tuesday* next following the fourth *Tuesday* of *January*, 1799, a writ of error this day prayed out against the said *Chalkley* and *Roger*, in behalf of the said *Nathaniel*, therein plaintiff, and against the said *Chalkley* and *Roger* therein named as defendants, which writ is brought to reverse a judgment rendered by the County Court of *Rutland* County, at their term of *November*, 1797, in favour of the said *Chalkley* and *Roger*, and against

James v. Smith.

the said *Nathaniel* for the sum of 703 dols. 38 cts. for their damages, and 14 dols. 41 cts. for their costs of suit, and shall pay and satisfy to the said *Chalkley* and *Roger* the *full amount of said judgment*, provided said judgment shall be affirmed, and answer and pay all intervening damages, in case the said *Nathaniel* fail to prosecute his said writ of error to effect, then this recognisance to be void, otherwise of force. Taken and acknowledged before me, this 9th day of *February*, 1798.

Enoch Woodbridge.

After *oyer* of the bond of recognisance and default,

Langdon filed the following motion:

Chalkley James, Appellee,
v.
Simeon Smith, Appellant.

And the appellant by his attorney now moves the Court here after judgment to recover his said debt contained in said bond of recognisance, to chancer the same to the intervening damages, which the plaintiff hath actually sustained by reason of the delay aforesaid, agreeably to equity and good conscience, according to the statute in such case made and provided. By

Vermont Stat. vol. 1. p. 83. s. 75.

Langdon, his attorney.

It was conceded, that the execution upon the original judgment, which had been stayed by the *supersedeas* in the writ of error, had not been purchased out

since the affirmance of judgment; that upon nonsuit on the writ of error, judgment had been rendered for costs and damages rated at 12 per cent. interest on the sum of the original judgment, execution had issued, and had been returned fully satisfied.

Chauncey Langdon, for the recognisor, contended, that whatever might be the form of the bond of recognisance, it must be controlled by the statute.

The statute provides, section 10th, "that when any person shall pray out a writ of error, in due form of law, and procure the same to be regularly served, and shall fail to enter and prosecute his said writ to effect, or shall become nonsuit, the defendant or defendants in error may enter his, her, or their complaint to the Court to which the same is made returnable, praying for his just damages and legal costs, and such Court shall award to the defendant or defendants in error, twelve per cent. interest on the original judgment *as damages*, and his costs, and issue execution accordingly." *Vermont* Stat. vol. 1. p. 57.

The statute has been complied with, as appears by the concession in the present cause. Defendant in error had filed his complaint, had judgment of Court for his *damages* and costs, with twelve per cent. interest on the original judgment, and purchased out his writ of execution, which had been returned fully satisfied. The damages and costs then received by the defendant in error, were the same damages and costs secured to him by the recognisance provided for by the 8th section of the same act, "*as just damages for the delay occasioned by such writ.*" To satisfy the original judgment, the whole course of

James v. Smith.

practice had been to refer the defendant in error to his execution on such judgment, which had merely been staid until the decision upon the writ of error. Here no other damages had intervened. The original plaintiff might at any time have taken out his execution on the original judgment, after *nonpross* in error; and the original defendant might at all times have been charged in execution, never having changed his commorancy described in the writ.

Cephas Smith, contra, objected to their shewing any payment in part. The statute does not apply; for although passed 2d of *March*, 1797, it will be recollected a suspension act was about that time passed, suspending the operation of this act until the first of *September*, 1798. The recognisance bears date the 9th of *February*, 1798. The former statute, under which the recognisance declared upon was taken, merely established the common law practice, and this recognisance is taken agreeably to such practice. The form is the same with that usually adopted before the late statute, which we confess varies the practice. That at common law, the recognisor forfeited the whole penalty.

Revised Stat. p. 617. *Fay's* edit.

Langdon. We were aware that the late statute went into operation subsequently to the date of the recognisance. But the statute passed *November* 1, 1791, merely enumerates the process in error, among others, in defining the civil jurisdiction of the Supreme Court. We now consider the Legislature by the late act have expressly affirmed what they

Harw. ed. *Vermont* Stat. p. 288.

considered to be the common law practice. Has any other practice than that which we contend for been attempted to be shewn? It is observable, that in the former statute power is given to the Court, upon motion, after judgment for the penalty of a recognisance, "to moderate the rigour of the law in consideration of the case, and according to equity and good conscience to chancer such forfeiture."

HALL, Judge. If the construction of the statute advocated by Mr. *Smith*, be correct, I have misled many an honest man. I have ever considered, that the recognisor was holden only for the interest and costs, on failure of a writ of error. The process in error merely suspends the execution upon the original judgment until search is made after error; and unless some intervening damages are shewn, such as the eloigning property, the absconding or bankruptcy of the plaintiff in error. I have never considered the defendant as entitled, upon the recognisance, to any damages; and never supposed it was optional with him, either to resort to his execution in the Court below for his judgment debt, or to take his remedy on the recognisance.

Woodbridge, Chief Judge. I have *generally* erased *intervening damages*, when a recognisance has been presented to me for signature, as I would have the conditions of the recognisance to rest entirely on the statute.

But this recognisance is said to be predicated on the common law practice. If this be true, it is

James v. Smith.

clear that the bond can never be chancered below the judgment debt.

Curia advisare vult.

At the ensuing term, the Court chancered the bond of recognisance to a sum merely nominal.

Cephas Smith, for plaintiff.
Chauncey Langdon, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, JUNE ADJOURNED TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.
HALL, Judge, absente.

SAMUEL BROUGHTON *against* DAVID WARD and ABEL WOLCOTT.

TRESPASS for taking one yoke of oxen, a mare and colt. General issue. Trial *per pais.*

Where a *privity* is shewn between several defendants in trespass, the words or acts of any one of them may be exhibited in evidence as proof of the trespass.

John Cook, for the plaintiff, stated, that on the 6th of *April*, 1798, the defendants purchased out two writs of attachment, one in each of their names, and both against the present plaintiff and one *Francis*. These writs were issued by and made returnable before Mr. Justice *Button*, on the *fourteenth* of the same *April*. They were served on *Broughton* and

Broughton v. Ward and Wolcott.

Francis the 9th of the same month, and by connivance of the then plaintiffs, (now defendants,) altered and made returnable on the 19th of *April* aforesaid. The Justice held his Court on the *fourteenth* of *April*, and not noticing the alteration in the writs, defaulted *Broughton* and *Francis*, rendered judgment, and issued executions in both actions. The executions were put into the hands of a constable to serve and return; who levied the execution in the name of *David Ward* upon the mare and colt, and that in the name of *Abel Wolcott* upon the oxen described in the declaration. The property was sold at public auction, and the avails paid to the present defendants.

Mr. Justice was sworn. He exhibited the two writs. The alterations suggested by the counsel were apparent. The writs of execution recited each a judgment rendered on the *fourteenth* of *April*, 1798, and were dated the 24th of *April*, 1798. The Justice testified, that the two writs of attachment were brought to him to sign by the defendant *Wolcott*, at which time they were made returnable on the fourteenth day of *April*, 1798; and on that day he rendered the several judgments on default, and granted the executions on the 24th of *April*, which he delivered to *Ward*, the other defendant. That on the *nineteenth* of *April*, 1798, he met *Broughton*, the present plaintiff, with *Francis*, and they told him they were going to his house to attend Court; that he then informed them he had rendered judgment against them in both suits, on the 14th of *April*.

Chauncey Langdon, for defendants, now objected to the several writs of attachment and of execution going to the Jury. The matter in issue is a joint trespass; their whole shewing several trespasses.

Sed per Curiam. There is sufficient *privity* shewn already in evidence between the present defendants. The acts of each, as combining in this joint trespass, may be shewn.

Further evidence was exhibited, shewing that the writs of attachment were purchased out at the instigation of *Francis*, who, before the service upon *Broughton*, altered himself the days of the returns with the privity of the present defendants, and afterwards turned out the oxen, &c. the property of *Broughton*, to satisfy the executions.

The Court inquired, if the defendants relied upon impeaching the credibility of the witnesses; and observed, that if their testimony could not be shaken, the defendants must be without available defence.

Verdict for plaintiff.

John Cook, for plaintiff.
Chauncey Langdon, for defendants.

Pierce v. Clark.

GEORGE PIERCE, Appellee,
against
JEDEDIAH CLARK, Appellant.

In action upon promissory note, the defendant having paid, in discharge of the note, sundry articles of merchandise, the common subject of charges on book, is not obliged to file his book account, under the 93d section of the judiciary act, but may shew such payment under the general issue.

PLAINTIFF declared upon a promissory note. General issue joined, and put to the Jury.

Defendant offered to shew in evidence certain articles of merchandise paid in discharge of the note.

Israel Smith, counsel for the plaintiff, objected; who read section 93. of the Judiciary act, "That if any action shall be pending in either of the Courts aforesaid, *Supreme or County Courts*, and the defendant or defendants shall have any just demand on book against the plaintiff or plaintiffs, which cannot be plead as an offset as aforesaid; it shall be lawful for such defendant or defendants, on or before the third day of the first term of the Court, in which, by law, he, she, or they, is or are required to appear to file in the same Court in which such action shall be pending as aforesaid, a declaration setting forth the nature of such demand, according to due form of law; which declaration so filed shall be sufficient notice to the adverse party to appear and answer thereto; and the Court, in every such case, shall proceed to the trial on such declaration, previous to the trial of the original action; and if the defendant shall recover on such declaration, the sum so recovered shall be plead as an offset against the original plaintiff's demand, as is above provided." And then insisted, that defendant should have filed his book account according to the

Vermont Stat. vol. 1. p. 92.

Pierce v. Clark.

statute provision; in which case auditors would have been appointed, and his client would have had the benefit of examining the defendant under oath relative to the correctness of his charges on book, of which he may now be deprived.

Vermont Stat. vol. 1. p. 236, 237.

Sed per Curiam. The statute provision does not abolish the common law privilege. The defendant may shew under this issue any thing which goes to the discharge of the note. Payment is always good shewing.

——— ———, for plaintiff.
Israel Smith, for defendant.

WILLIAM HOGG, *ex dem.* SILAS HODGES *et al.*
against
ERASTUS WOLCOTT, Tenant.

COSTS on new trial in ejectment.

Upon granting a new trial, the Court will not tax costs against the adverse party from the commencement of the suit, but merely those costs which have accrued after the granting of the new trial.

This cause, after being *several terms* in the County Court, came by appeal to the Supreme Court, and was tried *February* term, 1800. *Verdict for the plaintiff.* At the *May* adjourned term of this Court, 1800, defendant *Wolcott* filed his motion for new trial, grounded upon the recent discovery of new and material evidence. New trial was granted and had this present term, when the Jury found *a verdict for the defendant;* and now defendant moved for his

Hogg v. Wolcott.

costs to be taxed from the commencement of the suit in the County Court.

Chauncey Langdon conceded, that if the new trial had been granted by reason of the misconduct of his client, the plaintiff, full costs might have been taxed; but *e contra* where the new trial was granted on account of the misfortune of the defendant, occasioned by his ignorance of certain material evidence.

Per Curiam. The new trial was granted solely upon the discovery of *new* and material evidence. Here was no misconduct in the plaintiff. Let costs be taxed for the defendant, solely from the commencement of the new trial.

Langdon, for plaintiff.
—— ——, for defendant.

I. SMITH *against* ITHAMAR HUBBARD and ISAAC M'WITHY.

Where a new action is not barred by the statute, the Court will not readily grant a new trial, because the Jury have not pursued the direction of the Judge's charge.

MOTION in arrest of judgment, and for trial *de novo*, in ejectment.

This cause was tried at the stated term, *February*, A. D. 1801. Verdict for defendant.

Darius Chipman and —— ——, filed the following motion:

Smith v. Hubbard and M'Withy.

And now the said *Israel Smith*, in Court, after verdict, and before judgment had and rendered thereon, moves and prays the Court, that no judgment may be rendered on the verdict of the Jury in said cause, because he says that the verdict of said Jury was returned against him contrary to law and the directions of the Court in matters of law. Wherefore he prays the judgment of the Honourable Court, that the same verdict may be set aside, and a new trial granted in the same cause by his attornies, &c.

Arguments upon the motion were heard this term:

On motion for a new trial, because the verdict is against law and the direction of the Court, if it appears there were matters in fact as well as law under the consideration of the Jury, and that if the Jury found the facts one way, they had applied the law correctly, the Court will not attempt to discuss the motives to the verdict, but will presume it to be correct.

Daniel Chipman, against the motion, stated, that it appeared in evidence upon the trial, that in 1781, *John Paine*, brother-in-law to the plaintiff, sold an entire proprietary right of land, which embraced the lots described in the declaration, to the ancestor of the defendant. The plaintiff was conusant of the facts, and suffered his claim to lie dormant until the year 1794, when this adverse claim was made. That there was probable presumption that the plaintiff had given a deed of the premises to *John Paine;* and that afterwards, by some connivance, this deed was destroyed, and thus an equitable title at least was defeated. Both plenary and presumptive evidence of facts of this nature was before the Jury, who undoubtedly did substantial justice between the parties. The defence in the cause was the statute of limitations, and the verdict was founded on the weight of evidence, and not biassed by any moot points in law; and therefore this is not a case contemplated by the statute, which enables the Court to grant new trials.

Smith v. Hubbard and M'Withy.

Besides, the Court never favour new trials in actions of ejectment. Formerly they were never granted, because of the respect due to the possession of lands, and because the party might bring a succession of actions of ejectment; and the object of a new trial in ejectment could only be to save costs.

—— —— arose to reply.

Sed per Curiam. It is not usual for the Court to interrupt failing counsel; but the case is so clear, that it would be a waste of time to hear further argument.

The Court are directly against the motion, on two grounds:

First. If the statute of limitations does not bar a new suit, we see no propriety in granting a new trial.

Vermont Stat. vol. 1. p. 97.

Secondly. The Court are restricted by the statute in granting new trials to those cases alone where the Jury in the opinion of the Court *mistake the law.* Here were matters of law and fact given to the Jury. If the Jury found certain facts, they did not mistake the law; and we see no necessity of discriminating the motives of the verdict.

Motion discharged.

Darius Chipman and —— ——, for plaintiff.
Daniel Chipman, for defendant.

Page
v.
Walker.

THOMAS PAGE, Appellee,
against
SAMUEL WALKER, Esquire, Appellant.

The Court will not award a repleader after a judgment upon a material issue.

THIS was an action of debt on a bond. Defendant pleaded *nil debet*. Verdict for the plaintiff, and judgment for the penal sum. Motion to chancer filed by the defendant last term. And now the defendant moves for leave to plead *de novo*, that he might plead a release in bar, which was tested anterior to his filing the plea *nil debet*.

John Cook, for the defendant. In this action we were surprised into an immaterial issue. We had expected to have shewn our release under the plea *nil debet*, but the Court excluded it.

We learn from *Bacon's Abridgment*, vol. 5. p. 454. that the general rule is, that if there be an immaterial issue, and thereupon a verdict, upon which the Court cannot know for whom to give judgment, whether for the plaintiff or defendant, a repleader is regularly to be awarded; for such immaterial issue is not aided after verdict by 32 *Henry* VIII. c. 30. or any of the statutes of jeofail.

WOODBRIDGE, Chief Judge. This does not touch the present case.

Cook. True; but the trial in this case has not touched the merits of the cause. This is a motion that the Court will favour in order to do substantial

Page v. Walker.

justice. *Burr. Rep.* vol. 1. p. 292 to 301. *Rex* v. *Roger Philips*, Mayor of *Caermarthen.*

Daniel Chipman, e contra. The authorities do not apply. The present case does not come within the rules of the Court. Here a motion to chancer after verdict and judgment has been filed, and a motion for repleader is beyond all rule. But not to insist on this, the repleader is always awarded from something intrinsic, the record (never *extrinsic,*) or when the parties join issue upon an immaterial fact, which cannot help the Court to found a judgment, but not because the party has mistaken his ground of defence. Parties may have several grounds of defence. Some may be preferable to others, and have their election. In this case the party had his election, and the issue has been decided against him upon a material fact.

Per Curiam. From the statement of the defendant's counsel, this appears to be a hard case. But the Court cannot relieve. Here is a material issue joined, verdict, and judgment. The Court will not award a replcader after judgment.

Motion discharged, and cause continued by order of Court.*

Daniel Chipman, for plaintiff.
John Cook, for defendant.

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* The defendant sought relief in the Court of Chancery, and obtained a decree containing a perpetual injunction upon this suit, *February* term, A. D. 1805.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

BENNINGTON COUNTY, FEBRUARY TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
LOTT HALL, } *Assistant Judges.*
NOAH SMITH, }

STATE *against* TRUMAN SQUIRES, Esquire.

SPECIAL rule.

David Fay, State Attorney for said County, here moves the Court for a special rule to be served upon *Truman Squires*, attorney in this Court, to shew cause, if any he have, why he should not forthwith deliver to the grand jurors, duly impanelled, sworn, and charged by this Court, at this now term, diligently to inquire after and true presentment make of all felonious breaches of the law, for their inspection and examination, two certain promissory notes (which he holds in his hands as attorney to one *Thomas Mal-*

Upon a rule to shew cause, the Court will not order an *attorney* of the Court to deliver to the State Attorney, for the inspection of the Grand Jury, promissory notes suggested to have been forged, which had been delivered to the *attorney* in the common course of business by his client, suspected of committing the forgery.

State v. Squires.

lery,) for the sum of twenty-five dollars each, purporting to have been made by one *Silas Hubbel,* to the said *Thomas Mallery;* the said *Mallery* having been recognised by Mr. Justice *Sexton,* of *Manchester,* in this County, to appear and answer in this Court touching such things as might be charged against him for the falsely and feloniously forging and making the said notes; the Grand Jurors having the same now under their consideration.

David Fay, State Attorney.

Rule granted.

And now, on the same day of the term, Mr. *Squires* shewed cause, and observed—

That he felt himself delicately situated between the duties due to his client and the government. As an attorney of the Court he had a reputation to preserve, which must be principally grounded upon his unshaken attachment to the interests of his client. As a citizen he owed duties to the government, which he at all times esteemed it incumbent upon him promptly to discharge. The report that as an attorney he had wantonly disclosed the secrets of his client, and unnecessarily exposed him to public prosecution, and perhaps infamous punishment, would be painful. But the very imputation that, in defiance of his duties as a good citizen, he has suppressed evidence of crime, and sheltered the accused from public prosecution, might sully his character as an officer of the Court, and an honest man. As the point whether he should disclose the papers in question to the Grand Jury, could not be decided by considerations merely moral or honourable, but by considera-

tions of constitutional and legal propriety, he had hesitated to decide for himself, and had suggested to the State Attorney the measure of filing this rule; and confessed, that he anticipated from the decision of the Court, to which he should cheerfully submit, a direction to duty, and a sanction for his conduct.

At present it behoved him, as attorney to *Thomas Mallery*, to shew cause why the rule should not be made absolute. He conceded that he held in his possession certain promissory notes of the purport of those mentioned in the rule, and stated that they were delivered to him by *Thomas Mallery;* that in the ordinary course of the business of his office, he should have holden himself as accountable to *Mallery* only for the control of them, to whom he considered himself still attorney.

He then argued from the intimacy subsisting between persons in the relation of attorney and client, which in many cases amounted to almost personal identity in the contemplation of law. This intimacy, like that between husband and wife, was highly respected in judicial proceedings. When an attorney is sworn to testify in a cause in which he is or has been engaged as counsel, the very form of the oath administered contained an exception of such matters as have been communicated to him in confidence by his client. That the bill of rights prefixed to our constitution of government, declares, "that in all prosecutions for criminal offences, a person cannot be compelled to give evidence against himself;" that this clause in the bill of rights was one of the distinguishing marks between a despotic and free government, and should not be shaken by any considera-

Vermont Stat. vol. 1. p. 33. art. x.

State v. Squires.

tions of present expediency. That by the same bill of rights, any person accused of a crime hath a right to be heard by counsel. But how shall the accused venture to instruct his counsel in the nature of his defence, if the papers communicated in the confidence of a private consultation, might, in the course of the prosecution, by the order of the Court, be extorted from his counsel, and used as evidence against him? Would not this in most cases defeat the bill of rights?

Vermont Stat. vol. 1. p. 33. art. x.

Mr. *Squires* then observed, that the clauses read from the bill of rights are but in affirmance of the common law; and cited *Burrow's Reports*, vol. 3. p. 1687. *Rex* v. *Dixon*.

The State Attorney, in reply, observed, that he held the bill of rights in high respect; but he could not refrain from noticing, that the Legislature had considered that the clause which sheltered a person from being compelled to give evidence against himself, did not admit of so extensive a construction as that contended for by Mr. *Squires*. Provision had been made for search warrants in the case of stolen goods; and in the case of counterfeited coins, a person *may be compelled* to give evidence against himself. The act declares, "that every Justice of the Peace within this State is hereby authorised and empowered, and it is hereby made his duty to seize and take into custody every piece of such false, forged, altered or counterfeited coin, which he shall see, observe, or have knowledge of, and the same shall retain, entering the name of the person or persons from

Vermont Stat. vol. 1. p. 334.

whom he took the same, and at his discretion to cause the person or persons from whom he took such coin to come before him to be examined in the premises; and to administer an oath to such person or persons, to declare from whom he or they received such coin; and *proceed in his inquiries*, in manner aforesaid, for the detection of the author of such mischief, so far as he in his discretion shall think necessary." If the progress of the magistrate's inquiries leads to the felon himself, he will be compelled to give evidence against himself, and that under oath. But be that as it may, he thought it his duty, as public prosecutor, to pursue every legal course to bring offenders to condign punishment. If the Court considered this demand upon Mr. *Squires* not warranted by law, he should cheerfully submit to the decision.

WOODBRIDGE, Chief Judge. The attorney in this case must be considered as the keeper of these notes for his client. If so, in contemplation of law they are in the possession of *Thomas Mallery*. I doubt the propriety of ordering papers thus situated out of his possession for the purpose of making use of them against him. It is true there are search warrants for the discovery of stolen goods; and magistrates who may seize base coin, are authorised to examine persons through whose hands it may have passed, under oath. But these are *statute* provisions, which do not controvert the bill of rights. There are no instances of warrants to search for papers correctly issuable at common law.

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If *Mallery* makes use of these notes to support an action, the Court before whom such action is tried may and ought to direct them to be stopped. The case in *Burrows* I conceive to be in point.

HALL, Judge. I consider the only power the Court have over such papers, while in possession of the party or his attorney, whom I consider to be one in contemplation of law, must be when they are attempted to be exhibited in evidence in this Court. I do not think we have any more power over these notes than we have over any other private papers which Mr. Attorney may suggest are in the custody of *Mallery*, and which he may esteem requisite to maintain a prosecution against him. I am for discharging the rule.

SMITH, Judge. I am of the same opinion.

Rule discharged.

D. Fay, State Attorney, for the State.
Truman Squires, pro se.

JONATHAN PIERCE, Appellant,

against

JOSEPH HINDSDALL, Junior, Appellee.

In trover for a chattel loaned by the plaintiff to his son, and eloigned from the youth by a swindling contract, the son is inadmissible as a witness on the part of the plaintiff.

THIS was an action of trover and conversion, in which the plaintiff declared, that the defendant had converted to his own use a certain bay mare, the property of the plaintiff.

General issue joined, and put to the Jury.

Jonathan Robinson, for the plaintiff, stated, that *Pierce* loaned the mare to his son *Howard Pierce*, to ride to the western part of the State of *New-York*, who on his journey, without the knowledge or consent of his father, sold her in a swindling bargain to one *Cheney*, of *Bennington*, who for a valuable consideration sold the mare to the defendant.

Mr. *Robinson* now offered *Howard Pierce* as a witness to prove this statement.

Israel Smith and ——— ———, objected. They contended, that, from the statement of the plaintiff's counsel, *Howard Pierce* is interested in the event of the suit; and although his interest may not be direct it is consequential, and ought to exclude him from testifying. The same principle will apply in the conveyance of *personal* as real *property*. In the conveyance of real property, no one in the line of ancestry can be admitted to vitiate or strengthen his title, but is estopped to say that he has conveyed an estate in which he has no property. In case plaintiff recovers

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here, the record may be given in evidence in a future action brought by him against this witness. They further observed, that it had been determined by Lord *Mansfield*, that the drawer of a bill of exchange cannot be admitted as a witness to prove the acceptance, and thereby strengthen the security given by him to the payee; and that this case comes within the same principle.

Robinson replied, that the principles which govern the conveyance of *real property* will not apply to the transfer of *personal*. That the rules which control evidence in case of bills of exchange, are aside from those which regulate the transfer of property. The indorsement of a bill of exchange or promissory note is but the transfer of a chose in action. The sale of a chattel is always accompanied with possession and delivery.

Bills of exchange are creatures of the law merchant, and the whole operation of them, as regulated by *British* statutes and decisions, is for the facilitating commerce, and aside of the common law.

That the point in contest had been decided in the case of ——— ads. *Billings*, where the witness was admitted to testify. Here if there is any interest in the witness it is against himself; and where the interest is against the witness, he is willing to testify, and the party producing him will risk his testimony, the witness is admissible.

Per Curiam. The witness is inadmissible. He shall not be permitted to testify that he had no property in the chattel vended by him as his property.

He is consequently interested in the event of this suit. Plaintiff had his remedy against the witness or the defendant at his election. A judgment in favour of the plaintiff in the present action might, by the witness, *Howard Pierce*, be pleaded in bar to a future action, which the present plaintiff might hereafter institute against him.

Witness incompetent.

Jonathan Robinson, for plaintiff.
Israel Smith and —— ——, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

BENNINGTON COUNTY, JUNE ADJOURNED TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

EBENEZER HARRIS, Esquire, Appellee,
against
BIGELOW LAWRENCE, CHARLES DYER, DANIEL TINKUM, JOHN FULLER, ABEL HOUSE, SOLOMON FULLER, JOHN BURNET, and HOSEA FULLER.

In a declaration for a libel, if the plaintiff declares *quæ sequitur in his verbis, scilicit,* the minutest variance between the libel offered in evidence and the declaration, will be fatal. Intimation of the Court.

THIS was an action of trespass on the case brought by *Harris*, the appellee, against the appellants for a libel. Plaintiff declared, that for upwards of six years before the publication of the libel, he had been a good and faithful citizen of this and the *United States*, and

had been for six years aforesaid duly appointed by the Legislature of *Vermont*, commissioned and sworn to the office of Justice of the Peace within and for the County of *Bennington*, and to the time of the publication of the libel aforesaid, was always reputed, esteemed, and accepted amongst all his neighbours, &c. to be a person of good name, and also to have administered in his said office of Justice of the Peace as aforesaid, within his jurisdiction, with honesty, firmness, and impartiality, always conducting therein as became an upright magistrate of the people, and thereby acquiring large sums of money, to the comfortable support of himself and family, and great increase of his riches, to wit, at *Shaftsbury* aforesaid: yet the defendants, well knowing the premises, but falsely and maliciously contriving and intending to injure the plaintiff in his good name, and to prevent the Legislature of the State of *Vermont* from re-electing the plaintiff to the office of Justice of the Peace, and to ruin him in his reputation and credit therein, did, on the 27th day of *September*, A. D. 1799, at *Shaftsbury* aforesaid, write and publish the following false and scandalous libel to divers good people of this State, when in their General Assembly convened at *Windsor*, in the County of *Windsor*, at their stated sessions holden in the month of *October*, A. D. 1799, of and concerning the plaintiff, *in the words following*, to wit:

To the Honourable the Legislature of the State of *Vermont*, to be convened at *Windsor*, the second *Tuesday* of *October* next.

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The petition and remonstrance of us the subscribers, inhabitants of *Shaftsbury*, in which we humbly state the following facts, relative to the conduct of *Ebenezer Harris*, Esquire, Justice of the Peace in said *Shaftsbury*, to wit:

The said *Ebenezer*, instead of preserving the peace, is himself a peace-breaker. He has been guilty of quarreling, threatening and fighting on the sabbath and other days. He has been guilty of overreaching and obtaining an undue advantage in obtaining property of his neighbours. He does not possess that uprightness and integrity of heart and manners that become the man who is entrusted with the commission of the Peace. All which we are ready to prove.

We, therefore, confiding in the wisdom and uprightness of the Legislature, do solemnly protest against the appointment of the said *Ebenezer*, and as in duty bound shall ever pray.

Shaftsbury, 27th *September*, 1799.

Subscribed with the proper names of the defendants.

By the means of the writing and publishing of which false, malicious and defamatory libel, he the said *Ebenezer Harris* is greatly injured in his good name, fame, credit and reputation; and is brought nto public scandal, ignominy and disgrace among all his neighbours, friends and acquaintance, and those to whom the integrity and innocence of the said *Ebenezer* were unknown, have, from the time of the publishing the said libel, vehemently suspected the said *Ebenezer* to have been a breaker of the peace,

&c. *(as charged in the libel,)* and have on that account wholly refused, and still do more and more refuse to have any commerce, discourse or acquaintance with him, or to do business before him as a magistrate as aforesaid, as they were used and accustomed to do, and otherwise would have done, had not said false, &c. libel been written and published; and the said *Ebenezer* is otherwise greatly injured, &c. to his damage 10,000 dollars.

The defendants pleaded severally the general issue. Plaintiff joined. Defendants gave notice under the statute, that they should give the truth of the words in the supposed libel set forth in evidence on their defence; and the issues went to the Jury.

Plaintiff's counsel now offered to read in evidence a paper purporting to contain the libel declared upon.

The counsel for the defendants objected, alleging a variance between the libel declared on and that offered.

Chauncey Langdon, for defendants. The plaintiff declares, "*in the words following, to wit,*" yet the word "*heinous*" is in the paper offered in evidence, but omitted in the libel declared upon. There is also a variance in this: In the paper offered in evidence are the words "*obtaining property of his neighbours,*" simply; in the libel declared on, "*overreaching and obtaining an undue advantage in* obtaining property of his neighbours." The paper offered

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in evidence appears to have been signed by the defendants and twelve others, making twenty signatures in the whole. The declaration merely states, "signed by the defendants, with their proper names."

There are two modes of declaring upon libels, to wit, *in hæc verba*, in these words, or *cujus tenor*, to this intent. So, when an act is relied upon in a declaration, you may generally declare *in hæc verba* or *cujus tenor*. But in libels, if a plaintiff elects to declare *in hæc verba*, he is bound. He cited *Jacob's Law Dict. Toml.* edit. under the head "*Libels;*" *Gilbert's Law of Evidence*, p. 852. *Capel Loft's* edit. *Com. Dig.* vol. 4. p. 718. *Swift's System*, vol. 2. p. 50. Upon demurrer to a declaration upon a libel declared to be *in hæc verba*, *nor* for *not*, although expressing the same sense, was held to be fatal. *Read as advisory.*

David Fay, contra. The authorities cited by Mr. *Langdon*, are all in cases of criminal prosecutions for libels. In such cases, more strictness is required in favour of the subject. No such decisions in civil cases can be produced. Again, there is a distinction betwixt the doctrine of libels as received in *England* and in this country. In our mode of judiciary process on libels, our opponents can shew no hardships suffered and no advantages gained by such omissions. If the *English* doctrine of libels applies here, why not adopt it to its greatest extent? The same books will shew, that defendants in *England* could not give the truth of the libellous matter in evidence. This would operate in such manner upon

their clients, as that they would not wish so far to re-cognise the *English* doctrine of libels.

Chauncey Langdon, in reply. This kind of action ought not to be favoured, and a person instituting it ought to be well advised. No distinction can be shewn between a civil action and an information for a libel, as to the strictness required. Although no injury can be shewn as suffered by defendants through the introduction of this inapplicable paper, yet when suitors seek for justice, they must pursue it in the right way. If in the wrong mode, defendants have a right to withstand such process as may not comport with the regulations of Courts.

We deny that all our authorities were reports of criminal process. The law writers cited speak of informations and civil actions, and apply the doctrine we contend for equally to each.

The doctrine as to justification, by proving the truth of the words, does not apply to civil actions more in *England* than here. But granting the cases cited applied the doctrine exclusively to actions of a criminal nature, and the truth in justification prohibited in favour of the King, then surely the arguments derived from it would apply with redoubled force here. If in a government where the royal prerogative and the characters of men in high office are peculiarly guarded by the laws, so far that the truth of a libel shall not be given in evidence in justification, yet if even there they allow the slightest variance to avail in exception to evidence, surely in this free country a still greater latitude should be allowed. If the King, armed with the terrors of his royal prero-

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gative, and jealous of his dignity, when he arraigns his subjects for libelling his sacred majesty, allows by law the subject the privilege of taking exceptions to any variance suffered by the mistake of his attorney-general, surely a republican citizen may expect the same privilege.

Mr. *Langdon* was proceeding to shew the importance of the variances excepted to in the demurrer to the evidence; but was interrupted by the Court, who intimated that their judgment would be against the admission of the paper offered in evidence.

Fay now moved to amend the declaration, to make it comport with the libel offered in evidence.

On trial to the Jury, the Court will on motion order the declaration amended upon payment of costs.

Langdon objected. The amendment prayed for must rest upon our statute, which is nearly a transcript of the several statutes of jeofails in *England*. Consequently the *English* authorities will well apply to shew how far amendments are allowable. The great principle of amendment, as laid down in the books, is, that there shall be something on record to amend by. But statutes of jeofail never were designed to encourage or aid the mistakes of counsel or attornies. Here the plaintiff has elected his mode to declare, and must be bound by it. There is no defect in the process or mode of bringing the action, and the declaration is apparently good, but a mere mistake of the attorney drafting the declaration has intervened. He cited *Com. Dig.* vol. 1. p. 453. 479. and proceeded—

The present motion does not embrace a mere amendment, such as is contemplated in the books, but in fact goes to alter the very action itself. It alters the whole defence. An amendment of this nature would be novel in the decisions of the Court. I well recollect, that some terms since the Court refused permission, in *Rutland* County, so to amend a declaration, as among several general to insert a special count.

—— ——, in reply. The great object of all statutes of jeofails, and indeed it should be the great object of Courts of Justice, to keep parties in Court until justice be rendered to them. Our statute of jeofails is very broad, contemplating all possible cases of amendment short of creating a new action. This very liberal act, which has freed justice from the shackles of ancient techniæ, certainly should not be limited by a recurrence to those very principles from which it was designed to detach judicial proceedings. Mr. *Langdon's* positions go to exclude all amendments. Here neither the name or the nature of the action or the pleadings, will be affected by the proposed amendment. In *England* we shall shew by the books their Courts have gone greater lengths. *Burr. Rep.* vol. 2. p. 755. *Alder* v. *Chip.*

Fay likewise here read the case of *Bonfield, qui tam*, v. *Milner*, *Burr. Rep.* vol. 2. p. 1098. and *Jac. Law Dict. Tomlins's* edit. under head of "*Amendment.*"

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The Court allowed the plaintiff to amend under rule to pay costs to defendants.

The amendment was made *instanter*, and the cause proceeded to the Jury, who found their verdict for the plaintiff, one dollar damages and his costs.

David Fay and —— ——, for plaintiff.
Chauncey Langdon, for defendants.

EBENEZER HARRIS, Esquire,
against
BIGELOW LAWRENCE *et al.*

In an action upon a libel, if plaintiffs recover *above* 7 dollars in the County Court, and defendant appeals and plaintiffs recover in the Supreme Court *under* 7 dollars, he shall tax no more costs than damages.

QUESTION of costs, on the construction of the 97th section of the judiciary act, with its provisoes.

This was an action of trespass on the case for a libel. At the County Court, general issue was joined and put to the Jury, who *returned a verdict for the plaintiff*, 300 *dollars damages* and costs. Judgment entered up accordingly. Defendants appealed; and now at this term cause went to the Jury on the same pleadings as in the Court below, who found a verdict for plaintiff, one dollar damages and his costs.

David Fay, for plaintiff, moved the Court for full costs.

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Chauncey Langdon objected, and grounded his objection upon what he considered a correct construction of the statute, which enacts, "that in all actions of trespass *quare clausum fregit*, other than those in which the right of title or possession of any land, tenements or hereditaments shall come in question, *all actions of the case for slanderous words*, all actions of assault and battery, and all actions of imprisonment hereafter prosecuted in any of the courts of record in this State, if the damages found or assessed by the Jury do not surmount the sum of *seven dollars*, the Court shall allow no greater costs than damages.

Vermont Stat. vol. 1. p. 94.

"Provided, if the defendant appeal from *such judgment*, or review the cause, and final judgment shall be rendered for the appellee or reviewee, he shall recover full costs."

The proviso controls the preceding section. The words "*such judgment*" apply to it, and place it upon such or that judgment upon which the appeal or review was taken. It was manifestly the design of the Legislature to check litigation. If the plaintiff recovered at the lower Court *under seven dollars*, and defendant appeals, he the plaintiff, upon final recovery, shall have full costs. But if the plaintiff in the lower Court recover above seven dollars, say 300 dollars, as in the present case, the defendant does not appear litigious in his appeal; therefore in such case, if the plaintiff shall recover under seven dollars, he shall have no more costs than damages.

—— ——, for the plaintiff, in reply. We submit our construction of the statute, which we doubt

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not will be found correct. If the suit is concluded in the County Court, the plaintiff shall recover costs over or under seven dollars, as the case may be; but if defendant will appeal or review, and plaintiff recover again, he shall be entitled to full costs. The proviso embraces all cases in which the defendant appeals. Even if the damages are under seven dollars, he shall recover full costs.

WOODBRIDGE, Chief Judge. If judgment is rendered below for seven dollars or under, and defendant appeal, and plaintiff again recover, let the sum be what it may, he shall have full costs. But if the first judgment is above seven dollars, and defendant appeals, there shall be no more costs than damages. This is the plain language of the statute.

——— ———, for plaintiff. Under favour, this would be a very extraordinary construction. It would say to the plaintiff, if you recover a first judgment of only seven dollars, by which it is shewn that you have sustained but a small injury, and defendant appeals upon the recovery of even a small sum on the second verdict, you shall have full costs. But if you have shewn by the first verdict that your injury has been great, and have recovered a large sum in damages, then on a second recovery you shall measure your costs by your damages.

Fay. Since we are so unfortunate as to differ from the Court in our construction of the law, we will suggest, that we do not consider the present ac-

tion within the purview of the statute, which includes actions for slanderous words only. This action is for a libel. There is here a wide technical distinction.

Sed per Curiam. Let no more costs than damages be taxed.

GIDEON OLIN, Esquire,

against

NATHANIEL CHIPMAN, Esquire.

(Reserved Case.)

ACTION on the case for a libel.

This was an action for writing and causing to be published by the defendant, of and concerning the plaintiff, in the *Green Mountain Patriot*, a paper printed at *Peachum*, a libel "*of the meaning and purport following, to wit*"—"*Electioneering Communication.*" The paper was produced containing the supposed libel, and proved by the depositions of *Fairley* and *Goss*, &c. By the same evidence it was proved, that the word "*electioneering*," which in the newspaper produced preceded the piece charged as a libel, was not part of the writing published, but was prefixed by the printers to notify to the reader the subject matter of the piece. This was objected by defendant's counsel as a variance. It was further objected by said counsel, that there are further va-

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riances between the writing offered in evidence and the declaration in this case: for that in the declaration it is "*the* national government" instead of "*our* national government," and "*try-coloured*" in the declaration in two words, instead of "*tricoloured.*"

On exception taken by defendant's counsel for these variances, it is ordered by the Court that the trial proceed, and the paper adduced be read in evidence to the Jury, and that the verdict given in this cause be taken subject to the opinion of the Court, whether the said variances, or either of them, are in point of law fatal against the plaintiff, or if the same or either of them are amendable.

By order of Court,
Samuel Robinson, 2d Clerk.

Verdict for plaintiff.

The reserved points were argued this term.

Nathaniel Chipman, Esquire. Here are two points to be decided in the reserved case:

First. Are the variances, or any of them, between the libel produced by the plaintiff in evidence, and his declaration, fatal? Are they, or any of them, of such importance as would by judgment of Court have precluded the libel in the newspaper from being read in evidence?

Secondly. If such variances, or any of them, are fatal, would the Court have permitted the plaintiff so to amend his declaration as would have suited the mode of declaring to the evidence?

Actions of this nature are *stricti juris*. Actions of tort, as relative to plaintiff and defendant, differ from other actions as respects both. Rules relative to such actions are ancient, and any person who brings such action is supposed to be conusant of them. The defendant is as well entitled to see that the plaintiff is kept within rules, as the plaintiff is entitled to his judgment if pursued within these rules, but neither of them are to be favoured.

That these variances are fatal, will appear from a candid view of the doctrine on this subject.

There are two modes of declaring for words:

First. *In the words.* Thus: The defendant did falsely speak, utter and publish, of and concerning the plaintiff, the following words, to wit, You, meaning the plaintiff, are a perjured villain; in which mode the precise words are set forth.

Secondly. By the sense. That is, setting forth the substance of the words, thus: The defendant did falsely speak and publish of and concerning the plaintiff, that he the plaintiff was a perjured villain.

So there are two modes of declaring for a libel:

First. In the following words.

Secondly. According to the tenor following.

In the words. Thus: the defendant did utter and publish of and concerning the plaintiff, a false, defamatory and scandalous libel, in the following words, to wit, It is hoped that the freemen, &c. relating the words precisely.

By the sense. That is, setting forth the substance, that the defendant did falsely, and with intent to defame the plaintiff, write, utter and publish in writing, of and concerning the plaintiff, that he the plaintiff

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did, on the 16th of *August*, with a number of other persons from *Bennington*, &c. go to *Pownal*, and assist in raising what they falsely called a liberty-pole, &c.

The plaintiff in the present case has not adopted either of these modes. " In the words of the meaning and purport following, to wit," is not common *English*, but it is conjectured by what has been said by the plaintiff's counsel, to intend the declaring *upon the sense*. In this mode of declaring, it ought to be, The defendant did, *among other things*, falsely, &c. write, utter, &c. because if the piece contains any thing that does not relate to the plaintiff, it will be impertinent to introduce it; but to say, *ad effectum*, to the purport, says the case read is nought. *Salkeld's Reports*, vol. 2. p. 417. The reason is, the plaintiff is to give either the words themselves or the substance of the words. In the latter case, the plaintiff need not regard the precise mode in which the words are addressed. But for the plaintiff to say the words are of such an import or such a meaning, is to assume on himself the province of the Court, that of determining the construction of the words. He must not impose on the Court his own construction, but give the words either literally or in substance, and leave the construction to the Court. If the plaintiff had declared *in words* of *the meaning and purport following, to wit*, some constrained construction might be given that he had declared upon *the substance;* but his using the definite article " *the*," nails him to the precise words. " *In the words.*" Here he declares *in hæc verba*. What follows of the meaning and purport following only shews the construction he

puts upon the precise words, to which by his mode of declaring he is restricted; which construction it has been shewn he has no right to put.

If then the declaration is upon the words, surely at first blush the variances are fatal. But conceding that 'in the words of the meaning and purport following' is declaring upon the *sense*, we say, that the insertion of the word "*the*" in the declaration in lieu of "*our*" in the printed paper, has altered the sense. Publishing of the plaintiff, that he was violently opposed to all the measures of *our* national government, would be readily understood to mean a violent opposition in the plaintiff to the measures of the government of the *United States;* but not so, publishing of the plaintiff that he was violently opposed to all the measures of *the* national government. Here the particle "*the*," though definite, must refer for its meaning to some former member of the sentence, if any such exists. In a former member of this sentence, the *French* are spoken of, and an application of the expression "*the national government*" to the national government of *France*, would be natural.

These variances being thus proved to be fatal, it is now to be considered, are they amendable?

The errors of parties in common actions are to be remedied, but not here. The law never favours actions of this nature. We anticipate that principal reliance will be had upon our statute of jeofails; but the imperfections and defects mentioned therein relate to the forms of pleading, not to the substance. But allowing the statute its greatest latitude, if you plead a bad plea you cannot amend by substituting another in its stead. There is an action of conspiracy, and

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another in the nature of a writ of conspiracy. These actions are substantially different. Should plaintiff declare in one, no one would contend that the Court would allow a party to amend by substituting the other. The statute applies to any defect of form, want of form, or imperfection in form. All these shall be overlooked, except in cases of special demurrer. But here is no defect of form, want of form, or imperfection in form. The declaration was good in itself, it remains good, but the evidence adduced will not support it. This is not therefore a want of *form* in the declaration, but want of *power*, therefore not amendable by the Court. If authority to amend cannot be derived from our statute of jeofails, and any other authority of this nature exists, we shall wait patiently whilst the counsel for the plaintiff produce it.

Israel Smith, for the plaintiff. We consider that the declaration, as it now stands, counts upon the libel in substance. 'In the words of the meaning and purport following, to wit,' must intend, not the precise words, but words in sense and substance, words of the meaning; that is, words of the purport of those set forth in the libel stated in the declaration. We shall not dwell on this point. Certainly it is unworthy of elaborate investigation, especially as our client has another point in the case reserved to rest upon, from which we cannot be shaken. Let the present declaration be as it may, a recurrence to our statute of jeofails would place the subject beyond all controversy. If there be a defect in the mode, the Court have power, nay, are compelled by the statute,

to rectify such defect, upon such conditions as they may by their rules prescribe. The statute declares, "that no summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any of the Courts in this State, shall be abated, arrested, quashed or reversed, for any defect or want of form; but the said Courts respectively shall proceed and give judgment according to the right of the case and matters in law, as shall appear unto them without regarding any imperfections, defects, or want of form, in such writ, declaration, or other pleadings, return, process, judgment, or course of proceedings whatsoever; except those only in case of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof. And the said Courts may, by virtue of this act, from time to time amend all and every such imperfections, defects, and want of form, other than those only which the party demurring shall express as aforesaid, and may at any time admit either of the parties to amend any defect in the process or pleadings; upon such conditions as the said courts respectively shall in their discretion by their rules prescribe."

Vermont Stat. vol. 2. p. 74. s. 51.

The statute, it appears, enables the Court to amend all imperfections, defects and want of form. Not merely to supply the want of form, but to rectify imperfections and defects as well as want of form. It is manifest by these various expressions, embracing nearly the whole course of judicial process on the civil side, the Legislature meant to empower the Court to do something more than merely to rectify clerical mistakes.

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But it is said, that the object of the proposed amendment is to change the very nature of the action. The case is assimilated to an action for a conspiracy, and an action in the nature of a writ of conspiracy. These actions are said to substantially differ, and that the one could not be substituted for the other by any latitude of amendment. Be it so. Does the case stated apply here? Does the amendment from the precise words to the sense make a new action substantially differing from the former? Does such an amendment even operate a surprise upon the defendant? To meet the declaration, must the defendant vary his plea, evidence or defence? Amendments greater than that now contended for, and to which as strong objections have been made, have been directed in this Court. In debt upon bond, the date of the bond misrecited, the Court have permitted to amend, and the defendant has been estopped from saying, "You create a new action; this is another bond: the declaration is now good, but it wants power: the defect is not in the declaration, but in your evidence, which will not apply to it."

It is true there are two modes of declaring on libels laid down by systematical writers, but either of them may be indifferently chosen; either is a matter of mere form, and there is no sound reason to be given why one should be preferred, and in truth there are no appropriate words which conclusively attach to either; but if there were, the defendant should have taken advantage by special demurrer; for to all other imperfections, defects, &c. our statute extends.

Burrow's Reports, vol. 4. p. 2527. *The King* v. *Wilkes*. This case shews, upon solemn argument

and decision, the doctrine of amendment as established in the *English* Courts. That all such amendments as do not alter and make a different process, are allowed, whilst the utmost liberality is practised in the *English* Courts. We doubt not that here the Court will decide,

First. That the declaration now stands on the substance, or, if some trivial imperfection should appear, the Court will, in the words of the statute, give judgment according to the right of the case, without regarding any such imperfection, defect, or want of form. But if there are such defects in the declaration as it now stands as would be fatal, as no special demurrer has been pleaded, the Court will decide, that such imperfections, defects, or want of form, shall be amended upon such condition as they may under their rule prescribe.

Defendant, in reply. As the counsel for the plaintiff has rather attempted to evade than answer our arguments upon the first point, we shall rest it upon what has already been advanced.

Upon the second point, much reliance is had upon our statute of jeofails. An attempt is made to extend the purview of it to all defects excepting those specially set down in demurrer; and the question is put, why we did not demur in this case. The answer is ready: because the declaration on the face of it is good, and we repeat it, is a perfect declaration. But the plaintiff's misfortune is, he cannot avail himself of evidence which will comport with or support his declaration. And this illustrates the true doctrine of amendment, as established by our statute. The party

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may have leave to amend any defects, imperfections, &c. or want of form. But he shall not be permitted, under pretence of amendment, to vary, much more to repeatedly vary his declaration,* so as to comport with his own evidence, or elude the defendant's evidence or defence. Mr. *Smith* will not certainly contend, that although *some* therefore *all* amendments may be made under the statute. It is certain there are some defects not amendable. What are so, will be determined by the Court.

It is said, here is no new action created by any proposed amendment. The defendant came prepared to answer such action as the plaintiff might bring. If he made an imperfect declaration, the defendant might demur or go to trial. But if he makes a perfect declaration, defendant cannot demur, and plaintiff has no power, by any amendments, to destroy the defendant's rights.

It is said likewise, there are no appropriate words to express one mode of declaring on a libel more than another. In *Salkeld's Reports*, vol. 2. p. 660, 661, we find appropriate words: "There are two modes of declaring on a libel: one, *secundum tenorem sequitur*, or *cujus tenor sequitur;* the other, *quæ sequitur in his Anglicanis verbis sequentibus.*"

A case is cited from *Burrow's Reports*, *Rex* v. *Wilkes*. There *purport*, which was held nought, was altered to *tenor*, and we learn from that case, that although the libel was inserted *verbatim*, yet the *moot*,

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* There had been an amendment of the declaration in the County Court.

that is, whether *tenor or substance*, was not specified in the introduction or caption, and one or the other was determined to be indispensable. But in that case there was no changing or amending from one mode to the other; but from no mode to one mode for *purport* was declared to be *naught*.

It is said, the *English* authorities authorise amendments to a liberal extent.

To comprehend the liberality and extent of their amendments, it will be necessary to attend to a rule invariably observed in their practice, that all amendments shall be made while the cause is *in paper*, and none when it is in parchment. It is well known that the *English* original writ contains no declaration. The plaintiff files his declaration in a proper office, previous to the term to which the writ is returnable. Defendant takes a certified copy of the declaration and pleads. In this situation the cause is said to be in paper, and at this time amendments may be made; nay, the plaintiff may supersede the whole declaration, and file a new one after due notice to the defendant, and here the great and liberal latitude to amendments in the *English* practice is given. But when the cause is put in parchment, that is, when the writ is returned with the declaration into Court, and certain practical modes have passed, the whole becomes part of the record of the Court, and no, or at least very rare instances of any amendment appear.

The present cause, after an amendment and trial at the lower Court, and an appeal by our practice, may certainly be said to be put in parchment.

Olin v. Chipman.

Therefore, in every view of the subject, the variances appear to be fatal, and not amendable.

Per Curiam. The Court hesitate upon the first point. As to the second, they are rather inclined to consider, that the declaration is amendable. But as there is not a full bench, they defer an opinion until the next term, to which they direct the cause to be continued.

For the final decision, *vide May* adjourned term, *Bennington* County, A. D. 1802.

STATE *against* I. S. S.

THIS was an indictment for forgery. The defendant shewed in evidence a complete defence.

Mr. Attorney now moved to enter a *nolle prosequi*.

The State Attorney's prerogative of entering a *nolle prosequi* to an indictment, is suspended whilst the person charged is on trial. He cannot then enter without leave of the Court, who will not grant it when the defence appears to be ample.

Counsel for the defendant objected. We apprehend a *nolle prosequi* cannot be pleaded in bar to a subsequent indictment for the same offence. We consider our defence so ample and conclusive, that we are entitled to a verdict, and entry of judgment, *eat sine die*, that by plea of *auterfoits acquit*, we may be enabled to set this illiberal prosecution for ever at rest.

State v. I. S. S.

Per Curiam. We consider the State Attorney's prerogative of entering a *nolle prosequi* to be suspended while the cause is in issue to the Jury. He cannot then enter without leave of Court.

The defence here is ample and honourable to the accused. He is entitled to a verdict. Let the trial proceed.

The Jury returned a verdict of *non cul.* and defendant was discharged.

David Fay, for the State.
Royall Tyler, for defendant.

ABEL ALLIS, Appellant,
against
WILLIAM BRADLE, Appellee.

The original files of the County Court, with the clerk's certificate accompanying them, permitted to be read in evidence.

ACTION on promissory note. Indorsee v. indorser.

Plaintiff offered in evidence the original files of the County Court, on several pieces of paper in the action heretofore brought by the indorsee against the drawer of the note, accompanied with a certificate by the Clerk of the County Court, certifying a minute of the judgment in favour of the drawer.

—— —— objected, that certified copies of the entire record ought to have been produced, contain-

Allis v. Beadle.

ing an exemplification of the whole process and judgment.

Per Curiam. It is a very bad practice by the Clerk of the County Court to send his original files and minutes into this Court, and may be attended with manifest inconveniences. Here it was probably intended to save time, as it is probable the Clerk had not made up his records of the last term so as to embrace the cause. But as the originals are manifestly of greater import than the copies, and as they are in this Court, the Court will not inquire how they came here, but will proceed upon them.

Let the files of the County Court, with the certificate of the judgment accompanying them, be read in evidence.

STATE *against* S. S.

THIS was an indictment *contra formam statuti*, for sending a written challenge to fight a duel.

Upon demurrer to the indictment, the principal exception *inter alia* was that the indictment would not lie upon the act for the punishment of certain inferior crimes and misdemeanors, passed *March* 4th, A. D. 1797.

Vermont Stat. vol. 1. p. 365.

By the Court. The 21st section of the act enacts, "that if any person shall in any manner disturb or

break the peace by tumultuous and offensive carriage; by threatening, quarrelling, *challenging*, assaulting, beating or striking any other person; the person or persons so offending shall be liable," &c. The word *challenging*, taken in connection with the whole sentence, cannot intend a *written challenge*. The various modes of disturbing or breaking the peace noticed in the statute, are manifestly those of verbal abuse and personal outrage. This Court would be desirous of giving all legal countenance to a prosecution of this nature. The deplorable consequences of duelling recently exhibited in neighbouring States call loudly for the interference of the Legislature to check the very propensities to this irrational practice in the outset. But in the honest ardour to suppress crime, we must not, as a Court, give an unwarranted construction to the statute.

An indictment for sending a written challenge to fight a duel will not lie upon the 21st section of the act for the punishment of certain inferior crimes and misdemeanors, passed *March* 4th, 1797.

Indictment quashed.*

Fay, for the State.
Tyler, for defendant.

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* During their *October* session, immediately subsequent to this decision, the Legislature passed an act to prevent duelling, in which they sentenced the survivor, where death ensues in a duel, to death as in cases of murder; and where death is not the consequence, the act subjects the principals, seconds, or bearer of any challenge, to a fine of one thousand and not less than five hundred dollars, and incapacitates them for ever from holding any office of honour or profit, or of enjoying the privileges of freemen within the State. *Vermont* Stat. vol. 1. p. 367.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

WINDSOR COUNTY, AUGUST TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

ANDREW CULVER, Appellee,
against
MOSES BARNET, Appellant.

Where the plaintiff declares on a special contract, and has other counts for money had and received, and for work and labour done, in his declaration, if the special count on demurrer is ruled insufficient; on *non assumpsit* pleaded to the general counts, he may not give the special contract in evidence under the general counts.

ACTION on the case. Plaintiff declared, that at *Weathersfield*, *Windsor* County, on the 4th of *January*, 1796, in consideration that he the said *Andrew Culver* then and there paid to the said *Moses Barnet* forty shillings lawful money, to his the said *Barnet's* full satisfaction, he the said *Barnet* sold to the said *Culver* all the timber then lying on the ground, with

six standing trees on the southern part of Lot No. 46. in the fourth division of lots in said *Weathersfield*, meaning and intending, as the plaintiff avers, that part of said lot, which lies south of part of the same lot then owned by the said *Culver*, of which southern part of said lot the said *Barnet* then and there, for the consideration aforesaid, promised the said *Culver* that he should have full and free liberty to take all of said timber at any time when he the said *Culver* should choose, and also that he the said *Culver* should have full and free liberty to clear passways necessary for the removing said timber, he the said *Culver* not destroying any other valuable timber; yet the said *Culver* hath not had full and free liberty to take said timber, but after he the said *Culver*, relying on the promise of the said *Barnet* in this particular, had been at great trouble and expense in building bridges and clearing passways to enable him the said *Culver* to remove the said timber from the land on which it then was to his the said *Culver's* saw-mill in said *Weathersfield*, and in cutting said timber and preparing the same to be removed, and thereby had rendered the said timber of great value, one *Josiah Fisher* and one *John Williams*, who were the legal owners of the said southern part of the said lot, forbad and prohibited the said *Culver* from taking the said timber, to wit, at *Weathersfield* aforesaid, on the 20th of *November*, 1797, of which the said *Barnet* there afterwards the same day had due notice, and thereby became liable to pay to the said *Culver* the value of the said timber so rendered valuable by the said proceedings of the said *Culver*, and being so liable, then and there promised, &c. *ad damnum*, &c.

Culver v. Barnet.

There was

A second count for money had and received to the plaintiff's use;

A third for work and labour done.

At the last term, defendant demurred to the first count, and pleaded *non assumpsit* to the second and third; at which term plaintiff joined in demurrer, and to the general issue. The demurrer was then argued, and the Court decided that the *first count* in the plaintiff's declaration is *insufficient*. And now at this term the general issue was put to the Jury.

The counsel for the plaintiff now offered the following written contract in evidence in support of the second and third counts:

"Whereas *Andrew Culver*, of *Weathersfield*, has this day purchased of me the subscriber all the timber now lying on the ground, with six standing dry trees on the southern part of Lot No. 46. in the fourth division of lots in the town of *Weathersfield*, this is to give him full and free liberty to take off said timber at any time when he thinks fit, with liberty to clear passways necessary for removing said timber, he not destroying any other valuable timber.

"Given under my hand at *Weathersfield* this fourth day of *January*, 1796.

"*Moses Barnet.*"

Counsel for defendant. We object to this paper, said by the counsel for the plaintiff to be a contract, being read in evidence in support of the counts now to be considered under the general issue.

If the contents of this paper display any thing of the similitude of a contract, it is *a special contract.* The two counts now in issue are *general.* A special contract can never be shewn in support of a general *indebitatus assumpsit.*

Counsel for the plaintiff. The paper offered in evidence is a mere link in the chain of evidence. It shews a contract of some nature. It was at least an inducement for *Culver* to go to work, and raised, in conjunction with parol evidence, proving that labour was done in pursuance of the contract ready to be produced, a promise by *Barnet* to pay an equitable consideration for such labour.

Defendant's counsel. This thing said at one time to be a contract, and at another a mere inducement to a contract, whatever it is, was expressly stated in the first count of the plaintiff's declaration, to which there was a demurrer, and the Court decided in favour of the demurrant. The first count is no longer *in esse;* and now it is wished to introduce this defunct corpse of a special contract as evidence in support of general counts.

Per Curiam. The action now stands on the two last counts. The paper offered in evidence shews a special contract. It cannot be read in evidence in support of either of the general counts. To support general counts for work and labour done, &c. plaintiff must shew it was done at the special instance and request of the defendant, or for his benefit. This paper goes to shew a special contract to permit the

Culver v. Barnet.

cutting and removing of certain trees and timber; and the gist of the action, as stated in the first count, is the obstruction in removing them. This surely cannot apply to either of the counts. The paper cannot be read to the Jury.

Titus Hutchinson, for plaintiff.
Charles Marsh, for defendant.

PRESENT,

ENOCH WOODBRIDGE, *Chief Judge.*
LOTT HALL, *NOAH SMITH*, } *Assistant Judges.*

DANIEL DEWEY,
Assignee of the Sheriff of Windsor County,
against
JACOB BRADBURY.

If a bond be executed jointly and severally by three, and an alteration is made in it by the consent of two of the obligors in the absence of the third, and afterwards the seal and signature of the third be erased by the obligee or his agent, without the consent of the others, the bond is void.

THE plaintiff declared in debt upon a gaol bond, jointly and severally made and executed by defendant and one *Solomon Strong*, since deceased, to the sheriff of *Windsor* County, and by him assigned to the plaintiff; conditioned, in the usual form, that *Jacob Bradbury*, a prisoner for debt, should not depart the liberties of the prison; dated 1st *July*, 1800.

Plea, *non est factum*. Issue joined and put to the Jury.

And now the plaintiff offered a bond in evidence, the penal part of which recited, that *Solomon Strong*,

Jedediah Strong, and *Jacob Bradbury*, held themselves firmly bound and obliged, &c.

The execution of the bond by these three obligors was proved by *Daniel Short*, one of the subscribing witnesses. The signature and seal of *Jedediah Strong* did not appear on the bond.

Charles Marsh, for defendant, objected, that the bond offered in evidence, and proved by *Daniel Short*, is not the same bond declared upon.

Nathaniel Chipman, for the plaintiff, now stated, that the bond was originally made by *Solomon Strong*, *Jedediah Strong*, and *Jacob Bradbury*, but soon after the execution of it an immaterial defect was discovered in the bond, *scilicet*, *Jacob Bradbury* was set forth as being commorant in *Hartford*. This defect was rectified by erasing *Hartford*, and inserting *Hartland*. This was effected in the absence of *Jedediah Strong*, but the two other obligors were present, and consented to the alteration; and he contended that the bond was still good against them, although afterwards the erasure of the signature and seal of *Jedediah Strong* was made.

Charles Marsh. All that the plaintiff attempts to prove is, that the alteration was made with the consent of the two remaining obligors, but that, when they gave their consent, the seal and signature of *Jedediah Strong* still remained. It does not appear that they ever gave any consent to the erasure of the name and seal of their co-obligor, nor would they. This

Dewey v. Bradbury.

cannot therefore amount to a new acceptance and delivery by *Solomon Strong* and *Jacob Bradbury*.

Nathaniel Chipman. The bond became void. When altered it became no bond, but depended upon the subsequent act of the two individuals to render it obligatory. So in case where bond is given jointly and severally by ten obligors: it is altered; five consent and five refuse to consent to the alteration, and make a new delivery. It would hold against those five who consented. Each is bound by his individual act. If they had picked up an old bond signed by three others, not parties to their contract, and then executed it, would any one contend that they might not, after the execution, have cut off the immaterial names? They might have been *Indian* names, and as accidentally there as the wax. The plaintiff, or rather his assignor the sheriff, might have had incorrect ideas upon the subject. But whatever they might have thought, after the alteration the name of *Jedediah Strong* was mere surplusage. It might have looked like forgery to see it there, but it was no longer *Jedediah Strong's* bond. By the alteration it became as to him a mere nullity.

Charles Marsh. We wish to be informed if the object of the proffered evidence is merely to shew that *Solomon Strong* and *Jacob Bradbury* consented to the alteration of the bond so far as relates to the changing the names of the towns. If so, we will not contend.

Nathaniel Chipman. We expect to prove that the transaction between the assignor of the plaintiff and the defendant and *Solomon Strong*, after the alteration, amounted to an actual redelivery and acceptance of the bond.

Taylor, a witness, sworn. I was present when the alteration was made. A defect as to the town of *Hartford* was discovered. *Hartford* was erased and *Hartland* put in its place, by one *Turner*, a constable. *Solomon Strong* and *Jacob Bradbury* were present, consented to the alteration, and said that the bond should be taken as good, and no advantage taken. *Jedediah Strong* was not present, nor was any mention made of his name.

Adams, a witness on the part of the defendant, testified, that he was present at the alteration. *Solomon Strong* and *Jacob Bradbury* said they accepted the bond as good. *Turner* said he would get *Jedediah Strong* to consent to the alteration.

Charles Marsh. We now renew our objection to the bond being read in evidence. An immaterial alteration by a stranger does not destroy a bond; but when ever so immaterial an alteration is made by the obligee, it does destroy it. Here the alteration was made by *Turner*, the officer, a mere stranger to the contract, and the alteration was immaterial so the bond did not become a new bond, as contended for. The whole drift of the testimony shews, that all the consent of *Solomon Strong* and *Jacob Bradbury* went merely to their taking no advantage of the alteration,

Dewey v. Bradbury.

not to accept the bond as a new and separate thing. It is manifest they meant it merely as a consent to the alteration, but not to accept the bond as a binding instrument upon themselves separately from *Jedediah Strong*.

Nathaniel Chipman. The question, as now put to the Court, is a matter properly *in pais*, to wit, whether the evidence goes to prove a second delivery. It is not now a question whether the bond was nullified or not by the alteration. It is sufficient that the parties esteemed it so at that time; and the proper question to the Jury is, whether what was done by the two made the bond binding upon them.

Charles Marsh. The gentleman is endeavouring to steal a law point from the Court, and give it to the Jury. This is merely a point of law for the sole decision of the Court. It must be agreed that an immaterial alteration by a stranger cannot vitiate a bond, and all questions of erasures, &c. belong properly to the Court.

SMITH, Judge. This appears to be a transaction well understood by the parties, and I think they ought to be bound by it.

HALL, Judge. I am of a different opinion. The bond was altered; two consented; the third not present. The parties, it appears by the testimony of *Taylor*, never understood more than a consent to the alteration; and here appears a new bond by the era-

sure of *Jedediah Strong's* signature and seal. I am not for admitting this bond to be read in evidence.

Dewey v. Bradbury.

WOODBRIDGE, Chief Judge. I agree with Judge HALL. The two obligors never consented to more than the mere alteration of the bond. It is manifest, from the testimony of *Adams*, a consultation with *Jedediah Strong* upon the subject was contemplated. The officer said he would endeavour to obtain *his* consent. The bond cannot be read in evidence. If people will destroy their own securities, the Court cannot help them.

On motion of plaintiff, the papers were taken from the Jury, and the cause continued to the next term, when plaintiff was nonsuited.

Nathaniel Chipman, for plaintiff.
Charles Marsh, for defendant.

JOHN DOE, *ex dem.* MARTHA WENTWORTH,
against
ELIJAH STRONG and JOHN STRONG, Tenants.

THIS was an action of ejectment, wherein the plaintiff demanded the possession of 500 acres of land in *Bridgwater*, being the late Governor of *New-Hampshire's* right, as by the charter issued appears, lying in the north-east corner of said town.

Doe v. Strong.

Common rule entered; lease, entry and ouster confessed, and agreement to insist only on the title. General issue tendered, joined, and put to the Jury.

Defendants conceded the title in the plaintiff until the year 1781, and that they were in possession of the premises demanded.

Daniel Buck, for defendants. We shall shew, that in the year 1781, the town of *Bridgwater* was held in common among the proprietors under the charter; that by act of the Legislature a State tax, commonly called the *ten shillings* tax, was granted the same year. In pursuance of this act, the land was legally sold at public vendue; and our clients hold in fee under this sale.

Vermont Stat. vol. 2. p. 217.

A sheriff's return of a vendue sale for the non-payment of what is commonly called the ten shillings tax, is *illegal* if he states that he has located more land in any one section of a township than that quantity for which the lowest bidder offered to pay the tax on that particular section.

We shall first shew a warrant issued by the Treasurer of the State, directing the sheriff of *Windsor* County to vend the lands in *Bridgwater* for the non-payment of the tax, with the return on the warrant, attested by the sheriff, and recorded in the County Clerk's office, which the act declares shall make a good title to the purchaser, to the exclusion of all other claims.

Charles Marsh. We object to the return of the sheriff being read to the Jury. It is not warranted by the act, and therefore illegal. By his return it appears, that the sheriff set up for sale seven hundred acres of land, including the Governor's right, for the payment of the taxes due on said seven hundred acres. A person being the lowest bidder, offered by his bid to pay the taxes on this quantity of land for fifty acres. The sheriff set off to him fifty acres in

the north-east corner of the town, being the north-east corner of the Governor's right. He then set up for sale a second seven hundred acres, and a person bidding to pay the taxes on this quantity of land for fifty acres, he set off another fifty acres of land within the Governor's right, next adjoining and parallel with the former fifty acres; and so *toties quoties* until he had sold and absorbed the whole Governor's right. The title set up by the defendants is derived from these transactions.

Daniel Farrand, on the same side. We shall contend that the Governor of *New-Hampshire's* rights in the towns in this State, granted by the government of that then Province, are held in severalty from the other charter proprietors; that this mode of sale would go to sacrifice the whole of the Governor's right for the non-payment of the taxes assessed on the whole township.

Buck. The township of *Bridgewater* was not holden in severalty at the time of the sheriff's sale. No part of it was thus holden. The sheriff had therefore a legal right to locate in such part of the township as he judged expedient, such quantities and parcels of land as were severally sold for the non-payment of taxes on such proportions as were set up for sale. There could no injury result from it to the proprietors, as it would be only taking so much land from the common stock. Indeed it might be more convenient for the proprietors to have all such parcels of land located together, as the locating such parcels

Doe v. Strong.

of land indiscriminately in various parts of the township, might much perplex a future proprietary division. But it is said with peculiar confidence, that the Governor's right was holden in severalty. If this was the case, we concede the sheriff's proceedings are void; and we are willing here to rest the argument, that if the Governor's right was holden in severalty, the sheriff's sale is bad. But we call upon the defendants for proof of severalty by division, location, or other circumstances usually accompanying a severalty.

Farrand. The severalty of the Governor's right had taken place by the charter. Reference in the body of it is made to a plan of the town indorsed, which plan describes the outlines of the township of *Bridgewater*, and delineates a plot of five hundred acres for the Governor's right in the north-east corner of the town, where the Governor's right, it is peremptorily declared by the charter, shall be located. *Benning Wentworth*, Governor of *New-Hampshire*, grantee of the Governor's right, could take his land in no other part of the town.

The proceedings of the sheriff, as exhibited by his return, went to submit the Governor's right to pay the whole taxes of the town. The regular mode would have been, first to have set up the Governor's right for sale, and then located within it such parcel of land as the lowest bidder was willing to accept, for the payment of the taxes assessed upon it; then to have exposed to sale some other quantity and parcel of land within the township held by the proprietors in

common, and located within the parcel exposed to sale, such quantity of acres as another bidder might by his bid be willing to receive, and respond the taxes upon it; and so on until the whole town was exposed to sale.

Buck. Upon further investigation of the act it appears, that the plaintiff's right of action as against the feoffees under the sheriff's sale, is taken away. The 7th section enacts, "And lest injustice be done to any person, by having more of his land sold than enough to amount to his rate or proportion of the tax, be it further enacted, that if any person shall have more of his land sold than his proportion, he shall have a right of action and recovery against the person or persons who are delinquents with him, either in whole or in part, for their proportion, according to their interest of the value of the land so sold according to the appraisal of indifferent men at the time of such recovery." *Vermont* Stat. vol 2. p. 220, 221.

It appears the Legislature contemplated this very case. If the plaintiff had more of her land sold than enough to amount to her rate or proportion of the tax, she has a right of action and recovery against the other proprietors. This we contend has tolled her entry and barred her action of ejectment.

Farrand. If the gentleman had investigated a little further, he would have discovered, that the 7th section speaks no such language as may be conjectured from a superficial view of it, but that it goes to enforce the construction we contend for.

Doe v. Strong.

The person who has more of his lands sold than enough to amount to his rate or proportion of the tax, is one who holds undivided or unsevered lands in common with others, and his action lies against *those who are delinquent with him*, that is, against those who are tenants in common with him, not against him or her who holds land in severalty.

The late Governor of *New-Hampshire's* rights of land reserved to him by the several charters, are not considered as holden in common with the other proprietors of the the respective townships.

By the Court. The Governor's right in the *New-Hampshire* charters has been considered as located by every judgment of this Court where this point has been made, for fifteen years past. It is by the charter severed and not holden in common with the lands of the other proprietors.

But if the Governor's right lay in common, and the sheriff could proceed in the mode exhibited by his return on the Treasurer's warrant by connivance with the purchasers, he might select and vend all the best land in the township.

The true construction of the act is, that in towns where proprietary real property is found, or where lands are held in common, the sheriff may expose such lands to sale in such proportions as he might judge expedient. The Court consider, however, that as the present act granted a tax of ten shillings on each hundred acres, not more than one hundred acres ought to have been put up for sale at one time. When the sheriff had thus exposed to sale a section of the lands held in common, such part as was actually sold should have been located within the limits of the tract exposed to sale at that time. What remained should have been also exposed to sale in sections, and every

parcel sold located within that which passed under the sheriff's mallet. The sheriff's return cannot be admitted in evidence. Doe v. Strong.

Verdict for the plaintiff.

Daniel Farrand and *Charles Marsh*, for plaintiff.
Daniel Buck, for defendant.

JOHN DOE, *ex dem.* PELETIAH SERGEANT, Reviewer,
against
EPHRAIM ADAMS, Tenant, Reviewee.

EJECTMENT. In the trial of the issue to the Jury.

If the deponent is personally present in Court, his deposition cannot be read.

Daniel Buck, for defendant, offered to read the deposition of *Lemuel Sergeant*, which had been used in a former trial of this cause in this Court.

Amasa Paine, for plaintiff, objected to the deposition being now read, stating that the deponent was personally in Court.

Buck insisted that the deposition should be read, and observed, that the deponent, when the deposition was taken, was beyond the process of the Court. His client had failed in repeated endeavours to persuade

Doe v. Adams.

him to appear personally in Court. That he was now brought by the plaintiff upon an insidious design to compel his client, the defendant, to produce him as a witness, and thus preclude him from impeaching his testimony.

Sed per Curiam. If the deponent is in Court, his deposition cannot be read. Let the witness be sworn.

Amasa Paine, for plaintiff.
Daniel Buck, for defendant.

PRESENT,

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

MILLS OLCOTT,
Administrator of TIMOTHY OLCOTT,
against
SAMUEL MOREY.

If the administrator upon an estate represented insolvent brings an action, the defendant shall not be estopped from pleading counter demands in set-off, because he has exhibited those demands before the commissioners, whether such demands have been allowed or *disallowed* by them.

PLAINTIFF declared in case for several sums due to the intestate in his life-time.

First count. General *indebitatus assumpsit* in the sum of 2,000 dollars, for goods, wares and merchandise sold and delivered.

Olcott v. Morey.

Second count. 200 dollars, money laid out and expended.

Third count. 2,000 dollars, money had and received.

To these counts general issue was pleaded and joined.

Defendant then pleaded as a set-off, several sums, by eight counts in his declaration.

First count. For 40*l.* lawful money, due on liquidated account, *July* 18th, 1791.

Second count. General *indebitatus assumpsit* for 720 dols. 60 cts. money laid out and expended.

Third count. *Quantum meruit* for work, labour and service done, same sum.

Fourth count. On promissory note payable on demand, dated 4th *January*, 1793, for 500*l.* lawful money.

The fifth and sixth counts, for two other notes of the same tenor and date.

Seventh count. On promissory note, dated 24th of *March*, 1794, payable sixty days after date, for 660 dollars.

Eighth count. On a receipt dated 1st *April*, 1792, in which the intestate acknowledged the receipt of several deeds of land, conveying as follows, to wit:

One proprietary right of land in the town of *Lewis*.

Nine rights of land in the town of *Lincoln*.

One ditto in the town of *Orange*.

One ditto in *Peacham*.

And 1,200 acres of land in *Fairlee*, and which he was to dispose of and account for in partnership, or return said deeds; *innuendo*, meaning that said *Timothy* should dispose of said lands in reasonable time,

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and account and pay to the said *Samuel Morey* one half of the avails thereof, or return said deeds to said *Samuel* on demand. Then an averment that the intestate had disposed of said lands for the amount of 6,000 dollars, and ought to have paid one moiety, &c.

To these several counts in offset the general issue was tendered and joined.

And the administrator, according to the form, force and effect of the statute in such case made and provided, hereby gives notice to the adverse party, that under the above issue he shall rely on and give in evidence the following special matters, to wit:

That on the 18th day of *July*, 1796, the estate of the said *Timothy Olcott* (there not being sufficient estate to pay the just debts due) was, agreeably to the statute in such case made and provided, by the administrator represented as *insolvent* to *William Perry*, Esquire, Judge of the probate of wills for the District of *Hartford;* and on the same day last aforesaid the said Judge did appoint *Paul Brigham*, *Ebenezer Judd* and *Ebenezer Brown*, Esquires, commissioners to examine into the claims of the creditors to the said estate, and did then and there issue to the said commissioners a commission of that date, authorising the said *Brigham*, *Judd* and *Brown* to examine into the claims against said estate, and to make return of their doings thereon, in nine months from the said 18th day of *July;* and the said *Paul Brigham* and *Ebenezer Brown*, two of the said commissioners above named, having been duly sworn to the true and faithful performance of their trust, did proceed to appoint times and places to sit and examine into the claims against

said estate; and did publish the same agreeably to the act in such case made and provided: and the said *Brigham* and *Brown*, commissioners as aforesaid, did, at the several times and places by them appointed, proceed to examine into the claims against said estate, and did allow such claims on the same to the amount of 3,472*l.* 14*s.* 5*d.* lawful money; and on the 17th day of *April*, 1797, the said *Brigham* and *Brown*, commissioners as aforesaid, did make their return and report to said Judge of probate, stating the said several claims and the amount to the sum aforesaid, and the said return and report was then and there accepted by said Judge of probate, and a record thereof in his probate-office made according to law: and the said *William Perry*, Judge of the probate of wills as aforesaid, on the said 18th day of *July*, at the request of the said administrator, did also appoint the said *Brigham*, *Judd*, and *Brown*, being judicious and disinterested freeholders, appraisers to appraise the estate of the said *Timothy Olcott*, and to make an inventory thereof, and to make return of their doings thereon by the 1st day of *October* then next: and afterwards, on the 9th day of *November*, 1796, the time for the making said appraisal and inventory was extended to the 1st day of *January* then next; and the said administrator did, between the said 18th day of *July* and the said 1st day of *January*, by them the said *Paul Brigham* and *Ebenezer Brown*, two of the appraisers aforesaid, duly sworn according to law, cause a true and perfect inventory of all the estate both real and personal of the intestate, which came within his knowledge to be made; and the said appraisers did inventory and appraise the said estate at the sum of

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1,106*l.* 3*s.* 2*d.* lawful money, an attested copy of which said appraisal and inventory were, on the 6th day of *December*, in the year of our Lord 1796, returned to said Judge of probate, by him accepted, and in his office recorded; and a like attested copy now remains with the said administrator; all which proceedings of the said Court of Probate, by the records thereof, here ready in Court to be shewn, may more fully appear; whereby said estate appears to have been and to *be insolvent*, and not sufficient for the payment of the just claims so allowed by said commissioners. And the administrator further says, that the said estate is not now so far settled and adjusted, as that it can be determined what dividend can be made for the satisfaction in part of the claims so by said commissioners allowed, nor hath the said Judge of probate made any decree or order directing the said administrator to pay the debts due from said estate, or any proportion thereof.

Signed by the plaintiff's attorney.

The cause now went to the Jury. Exception was taken by the defendant's counsel to the subject matter of the notice being proved to the Jury. After some argument, from an intimation by the Court, the parties entered the following agreement on the record:

It is agreed between the parties, that the verdict of the Jury shall be taken under a reserved case, of which the above notice shall be considered as part. And further,

That one promissory note given by the intestate to the said *Samuel Morey*, dated 4th of *February*, 1793, for the sum of 500*l.* lawful money, with interest pay-

able on demand, the whole contents 625*l.* which has been *allowed* by said commissioners.

Also one other note given by the intestate as aforesaid, dated *March* 24th, 1794, for 660 dollars, with interest payable in two months after date, the whole contents 790 dols. 97 cts. allowed by said commissioners, and a receipt for nine rights of land in *Lincoln*, valued by agreement at ten pounds each, one right in *Lewis* at twelve pounds, one in *Peacham* at thirty pounds, with four years interest on the whole, allowed by the said commissioners.

And the two following promissory notes, given by the intestate to the said *Morey*, and *disallowed* by the said commissioners, to wit, a promissory note, dated *February* 4th, 1793, for the sum of 500*l.* lawful money, with interest, payable the 1st of *January*, 1794, and another promissory note for the same sum and of equal date, payable the 1st *January*, 1795, should be given in evidence to the Jury, and that a verdict shall be taken in said cause, subject to the order and decision of the Court, on the law arising from the above case and facts.

Signed by the counsel for each party.

The Jury found a verdict for the defendant *Morey*, to recover of the plaintiff, in his capacity of administrator, the sum of 7,695 dols. 97 cts. being the sum that the intestate was in arrear to the defendant.

And now, at the after sittings of the same term, the reserved case was argued and decided.

There were two points made which were argued in the nature of a demurrer to the evidence advanced in support of the counts in the set-off:

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First. Whether a claim exhibited before the commissioners, on an estate represented insolvent, and *allowed* by them, can be afterwards counted upon in offset to an action commenced by administrator for the recovery of a claim in favour of the estate.

Secondly, which was the principal point, whether a claim exhibited as aforesaid to the commissioners, and by them *disallowed*, can be afterwards counted upon in such offset.

Vermont Stat. vol. 1 p. 152, 153, 154, 155, 156, 157.

The counsel for the plaintiff read the following sections from the act for the probate of wills, and settlement of testate and intestate estates, passed *March* 10th, 1797 :* sections 82, 83, 84, 85, 86. with proviso, and sections 88, 89. and from these sections they contended, that when an estate of an intestate was by the administrator represented as insolvent to the Judge of probate, and he had appointed commissioners to receive, examine and adjust the claims of creditors. Whilst the right to prosecute for the recovery of the debts due to the estate remained in the administrator, the usual process in the common law

* No question appears to have been made, whether the act passed *March* 8th, 1787, operated in this case. This act was repealed by a general repealing act, passed *November* 10th, 1797, and went into effect the 1st *September*, 1798, and in section 3. enacts, " That the aforesaid repealed acts or laws shall be in full force as to all matters and things done or transacted during their existence, to which they relate to all intents and purposes as though this act had not been passed." But it may be questioned whether a recurrence to this act would have varied the decision.

courts was suspended as to the creditors; for that section 86. declares, "that no action against any executor or administrator of any *insolvent estate* shall be sustained except for debts due to the State, debts due for rates or taxes, last sickness and funeral charges; unless the executor or administrator, having objection to the claim on which the action is brought, consents to have the same settled by course of law."

Section 89. "That all actions brought against any executor or administrator, before any estate is represented insolvent, shall, when such estate is found to be insolvent, be discontinued, unless the executor or administrator consent to have a trial at law, as before directed in this act."

That though the rights of the creditor are diverted to another channel, yet they are not abridged; for section 84. provides, "That if any creditor shall exhibit his claim or demand against such estate so represented as aforesaid to the commissioners as before mentioned, and the said commissioners shall disallow it wholly or in part; such creditor conceiving himself aggrieved by the judgment and determination of the commissioners, may, at the time such commissioners shall make report and return to the Judge as before mentioned, or within twenty days afterwards, if such demand so disallowed, in the whole amounted to twenty dollars, or if the sum allowed by the commissioners of any demand exhibited be twenty dollars less than the sum demanded, *appeal* from the judgment and determination of the commissioners to the Supreme Court next to be holden in the same County, whether the same be a stated or adjourned session of said Court, signifying to the Judge in writing such

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his desire, and filing in the probate office a declaration of his demand against such estate, drawn up with the same legal certainty as is required in prosecuting demands in the courts of law. And the Judge shall cause the executor or administrator to be served with a copy of such declaration, and of the appeal made by such creditor, at least twelve days before the sitting of such Court, if there shall be so many days between the time of filing such declaration, and the time of the session of such Court, and if there shall not be so long a time, then the copy aforesaid shall be served as soon as may be, and the creditor may, at the Court to which the appeal is made, on the first day of the sitting of said Court, enter his action as plaintiff against the executor or administrator, and shall produce an attested copy of such his declaration, and a certificate from the Judge of probate that notice hath issued to the executor or administrator thereon; and upon such declaration such pleadings may be had and the matter issued in the same way and manner as though such action had been commenced in the ordinary and usual way, and had been entered in said Supreme Court by way of appeal from the County Court."

Here the creditor's right to the opinion of this Court is secured, and his right to trial by Jury is not taken away. To shew the intention of the Legislature still further, the same section provides, "that the Supreme Court shall certify to the Judge of probate the judgment they shall give thereon."

This Court is to issue no execution on the judgment, except for costs; but the judgment is to be considered only as rectifying or affirming the pro-

ceedings of the commissioners under the Probate Court. Every thing relative to the claims of creditors to an insolvent estate, is to be kept distinctly within the process of the Probate Court.

Further, in the proviso to the 86th section, an action is expressly given to the creditor against the administrator for the proportion of the insolvent estate to which he is entitled by the report of the commissioners after the expiration of a certain time allowed by the Judge of probate; and the result of the judgment in favour of the creditor is to be an execution *de bonis propriis*, and this is the only action contemplated by the statute for the creditor to have.

From whence they inferred, that the creditor could not bring his claims against an insolvent estate, though allowed by the commissioners, into this Court in the usual course of process, or, as the statute expresses it, " by course of law."

But if they were incorrect in this view of the statute upon the *second point* made on the case reserved, the statute provisions will be too plain to admit of doubt.

The creditor is not only estopped from exhibiting in set-off such claims as were disallowed by the commissioners, but by a clause in the 84th section, " if the creditor shall fail to enter his action in manner and season as before directed, his demands shall be for ever barred."

To shew further the intention of the Legislature to keep the creditor to an insolvent estate strictly within the probate process, they read the 83d section, " That all demands against any estate represented insolvent as aforesaid, not exhibited to the commissioners

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within the time limited by the Judge for that purpose, shall be for ever barred; unless the creditor or creditors can find some estate of the deceased not inventoried or accounted for by the executor or administrator; in which case, after allowing and deducting such costs and charges as to the Judge may appear reasonable, if the estate so found be sufficient, the said creditor or creditors shall first receive a dividend so as to make him, her, or them equal to the other creditors of said estate, if there be so much remaining after deducting costs as aforesaid, and the overplus (if any there be) shall be divided in due proportion among all the several creditors to said estate."

They contended further, that the declaration in set-off is to all intents a new action, contrived merely to avoid the expense and delay of mesne process. That anciently opposite claims, which could not be pleaded under the same action, were pursued by several process to distinct judgment, and the party who recovered the first judgment was allowed to plead it against the less vigilant party. This was effected partly by the common law practice, but principally by the regulations of successive statutes. But the statute declaration of set-off, styled rather awkwardly in our code, offset, has all the properties and every defence which can be made to a new and independent action, attaches to this declaration. The party declaring in offset is therefore estopped from saying, this is my defence to the plaintiff's action, and thus to elude those wholesome restrictions of the law which would have barred his right of action if he had commenced in a distinct and separate suit. The de-

claration in offset does not become a defence, until the Jury have found the *issue* in favour of the offset, and ascertained the damages. Then the Jury, by virtue of the power vested in them by the statute, apply these damages *in defence* against the demands of the plaintiff. But while the declaration in offset is *in transitu*, it is subject to all the rules of pleading, controlled by all restrictions of practice, and limited by all the common law and statute bars, as effectually as if the declaration had stood on the files as pertaining to an original suit.

The counsel for the defendant replied, that conceding that upon an intestate estate being represented insolvent, that the statute had diverted the prosecution for the recovery of claims of creditors from the common law channel, and that all suits depending in the Courts of law were to be discontinued; yet a right was reserved to the administrator to litigate any claim in the usual course of juridical practice, when in the words of the statute, "*he consents to have the same settled by course of law.*" By the impetration of this writ the administrator has elected to have this creditor's claim settled by course of law. It would be a monstrous doctrine to conclude, that the administrator, by force of the probate act, might prosecute and recover the claims of his intestate *by course of law*, and the debtor be estopped from his defence. The power of the commissioners is not merely to receive and examine, but to *adjust* the claims of creditors. The term *adjust* implies a power in the commissioners to examine *counter claims*, and to adjust the balance between the estate and the creditor. A case might

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be put, perhaps this very case, where the creditor may have exhibited his claim, the administrator may have exhibited a counter claim on the part of the estate represented insolvent: the commissioners may have docked both, or allowed the amount of each, and finding the balance equal, may on this account have disallowed the claim of the creditor; and the parties finding there was nothing due to either, neither would have any inducement to appeal. But should the administrator afterwards institute a suit on his claim, on trial shall he be permitted to say to the creditor, You have had your day in the commissioners' court; your claim has been disallowed by them; you waived your right of appeal; you are now therefore precluded from pleading your claim (however honest, and though esteemed such by the commissioners) in offset against mine? The statute certainly is not pregnant with such absurdity.

This will apply likewise to the general bar in section 83. A creditor may be convinced that his claim is balanced by a claim on the part of the insolvent estate. He therefore omits to exhibit his claim to the commissioners. If afterwards administrator commences a suit against him, shall he be precluded from pleading his own claim in defence? Shall he not shew that he did not owe the intestate any thing?

The declaration in offset is not in the nature of a separate independent action, but by force of the statute is incorporated into the action to which it is pleaded. The statute provides, "that if the plaintiff, in any action pending before any Court on bond, bill, note, or other contract, shall be indebted to the de-

Vermont Stat. vol. 1. p. 92.

fendant in such action; the defendant, after pleading the general issue, or confessing the plaintiff's cause of action, may plead an offset of any sum or sums due to him from the plaintiff as aforesaid, which plea shall be in the nature of a declaration, with one or more counts as the nature of the case may require; and if the plaintiff shall plead the general issue to any or all the counts in the defendant's plea, or shall confess the cause of action contained in any or all the counts in the defendant's plea, he may in like manner plead in offset any sum or sums due to him from the defendant as aforesaid; and the issue and pleadings being closed, the Jury shall be directed to find generally such sum or sums as shall be found in arrear from either, and judgment shall be rendered thereon accordingly."

Here the statute declares, that defendant may *plead* in offset, that is, plead in defence to the plaintiff's declaration, which he has either traversed or confessed, which plea shall be *in the nature* of a declaration, not a new declaration independent of the declaration to which it is pleaded; and though the plea is in the nature of a declaration, and there may be said to be the semblance of a second declaration in the cause, and several issues may be put to the same Jury, yet they all, by force of the statute, converge into one issue, resolving into such sum as shall be found in arrear to either party. The defendant is therefore entitled to all those legal advantages which would accrue to him from any other mode of defence.

Provision also appears to be made by the statute for the plaintiff in his turn to plead in offset. This

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declaration, according to the doctrine contended for, would be a separate action, and here we should have three independent actions embraced in one record. This is too absurd.

The Chief Judge delivered the opinion of the Court.

The Court see no distinction in the present case between claims *allowed* or *disallowed* by the commissioners.

If the administrator elects to institute a suit upon claims in favour of an insolvent estate, the adverse party must not be estopped from such legal defence as would have been available in case the commission of insolvency had not issued. Even the general bar, in case where the creditor failed to exhibit his claim to the commissioners, could only be pleaded to an action instituted by the creditor, and could not be taken advantage of by the administrator under the general issue in offset to the exclusion of the defendant's defence.

The Court consider a declaration in set-off, not as a distinct action, but merely a statute provision made in aid of the rules of practice, which might not allow the subject matter of it to be shewn in evidence under the ordinary issue to the plaintiff's declaration, consistently with the techniæ of pleading and practice. It is in its nature the party's defence, of which the Court will not suffer him to be deprived.

SMITH, Judge. Though I am in opinion with the Chief Justice in supporting the verdict, yet I am ra-

ther inclined to consider, that the exhibition of his claim to the commissioners of an insolvent estate is necessary to the taking the creditor out of the bar in the 83d section of the statute.

Verdict of the Jury affirmed.

PRESENT,

ENOCH WOODBRIDGE, Chief Judge.
LOTT HALL, } *Assistant Judges.*
NOAH SMITH, }

SAMUEL UDALL, Appellee,
against
WILLIAM RICE, Sheriff of Windsor County,
Appellant.

DECLARATION for taking insufficient bail.

A sheriff must at his own risk take such bail for prisoners admitted to the liberties of the gaol yard, as, in case of escape, shall be sufficient to satisfy a judgment in favour of a creditor, *in money.*

Plaintiff declared in case, that he recovered judgment against *Seth Emmons*, at the *Windsor* County Court, holden on the third *Monday* of *September*, 1799, for 86 dols. 64 cts. damages, and 6 dols. 26 cts. costs of suit; and on the 30th of the same month purchased out his writ of execution, and on the same day delivered the same execution to the defendant *Rice*, in his capacity of sheriff of the County, to serve and return, according to law; who returned on the same execution, that he had committed the body of *Seth Emmons* to the common gaol in *Woodstock*,

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Windsor County. That on the 26th day of *November*, 1799, the sheriff admitted *Seth Emmons* to bail for the liberties of the gaol yard, and took a bond of that date for that purpose, made and executed by *Seth Emmons* as principal, and *Lysander Richardson* as surety, with the usual conditions; which bond became absolute by the escape of *Seth Emmons;* and on the 20th *January*, 1800, sheriff *Rice* assigned the bail-bond to the said *Samuel Udall*, who, upon the 5th of *March*, 1800, commenced his action upon the bond against *Seth Emmons* and *Lysander Richardson*, before the *Windsor* County Court, holden on the third *Monday* of *March*, 1800, and recovered judgment against them for 106 dols. 74 cts. damages, and 15 dols. 2 cts. costs of suit; and the said *Samuel Udall*, on the 25th of *September*, 1800, took out his writ of execution on said judgment, and on the same day delivered the same execution to the said sheriff to levy, serve and return; and the said sheriff made return on said execution, that he had arrested the body of the said *Seth Emmons*, and committed him to the gaol in *Woodstock* aforesaid, and on the same execution returned a *non est inventus* as to *Lysander Richardson;* and the said *Samuel Udall*, on the 1st day of *January*, 1801, took out an *alias* execution against *Lysander Richardson* on the same judgment, and on the same day delivered the same to *John Palmer*, constable of *Woodstock* aforesaid, to levy, serve and return; who returned on the same *alias* execution, that he had arrested the body of the said *Lysander Richardson*, and him committed to the common gaol in *Woodstock* aforesaid. By means of all which, and the insufficiency of the said *Seth Em-*

mons and *Lysander Richardson*, the obligors in the bail-bond aforesaid, to respond said judgment, the said *Samuel Udall* hath totally lost the benefit of the said judgment: and he avers the judgment remains in full force, and in no part paid or satisfied, and an action hath accrued, &c. *ad damnum*, 400 dollars.

Defendant pleaded not guilty, and gave notice that he should give the following special matters in evidence under the statute, viz.

That the said *Lysander Richardson*, *at the time* he was accepted as bail for the said *Seth Emmons*, was a good and sufficient freeholder, resident within this State, and possessed estate both real and personal to the amount of three thousand dollars.

Cause to the Jury.

Titus Hutchinson, for the defendant, now offered to shew in evidence the facts stated in the above notice.

Charles Marsh, for the plaintiff. We object to such facts going in evidence to the Jury. The defendant's right to give any especial matter in evidence under the general issue, must result from the 98th section of the act commonly called the judiciary bill; which provides, "that the general issue of not guilty, *nil debet*, or any other general plea proper to the action, whereby the whole declaration is put upon proof, according to the nature of the case may be made by the defendant; under which general plea the defendant shall have liberty, upon trial of the cause, on such general issues, to give any special matters in evidence, in his defence or justification, as the nature

Vermont Stat. vol. 1. p. 95.

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of the action may be, the defendant giving notice in writing, with the plea of the special matter or matters on which he or she shall rely in such defence or justification; and no special matter shall be given or allowed in evidence, except such as shall be particularly mentioned in such notice in writing as aforesaid."

Here the Legislature, to abbreviate and to render modes of pleading more simple, and perhaps in tenderness to the more uninformed practitioners at the bar, have provided a more summary mode of pleading matters in justification than the ancient mode of pleading in bar. Although the elder mode was familiar to every man of decent acquirements in his profession, and affected a precision which it is apprehended will not always be produced by the new statute mode, yet it must be confessed the novel mode will lessen the labours of the indolent, and sometimes prevent the ignorant from being entangled in the mazes of mere technical pleading. And so far the Legislature have acted wisely. But the objects of the statute are merely to render the mode of pleading brief and plain, but not to countenance error; to render the path of justice more facile and plain, but not to encourage or protect the ignorant in their aberrations. If a practitioner at the bar has matters in justification or defence which may avail his client in a plea in bar, he is not restrained by the statute from clothing his justification or defence in such plea. But if he will prefer the statute mode of giving notice of such special matters in justification or defence under the general issue, he must be confined in his notice to such special matters as would be proper

in a plea in bar to the action; and as the replicant to a plea in bar, if he would shew that the matters therein pleaded are impertinent, and form no legal answer to his declaration, may demur to such plea, so here, when under general issue notice is given of irrelevant and immaterial matters, to be shewn in evidence and insisted upon in justification or defence in this new and lax mode of pleading. If the plaintiff is exposed to be injured by such impertinent matters, he may object to the evidence of such matters being shewn to the Jury, although stated in the notice in the nature of a demurrer to the evidence. This being the intent of the statute, and the practice necessarily growing out of it, to carry its design into effect without injury to parties, we shall in the present case object to the evidence of such facts as are stated in the notice going to the Jury, and shew that they are such facts as are impertinent to the issue, and could not avail the defendant in justification or defence, if more regularly pleaded in bar.

When a sheriff has committed the body on execution, taken a bond of the prisoner, with surety admitting him to the liberties of the prison yard, and an escape is made, the sheriff must exhibit his bond and offer to assign it to the creditor, or pay the contents of the execution: if he assigns the bond, and the creditor brings suit against the bail, recovers judgment, takes out execution, and a *non est* is returned upon it, and a suit is commenced against the sheriff, he cannot in his defence shew that the bail *was*, but he must shew that it *is* sufficient. The language of the sheriff here is, "I have taken your execution to collect. I have committed the debtor to gaol. I have admitted

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him to the liberties of the gaol yard. He has escaped. I have assigned you the bail-bond. You have prosecuted the bail. He is *now* found to be insufficient to respond the judgment, but when I accepted him as bail, in my opinion he was a man of sufficient property, and I now give you notice I can prove it."

But though this is the language of the sheriff, it is fortunate for my client the plaintiff it is not the language of the law.

Vermont Stat. vol. 1. p. 280. 284.

We shall read the act entitled, an act relating to gaols and gaolers, and for the relief of persons imprisoned therein, sections 10th and 11th.

The former section provides, "that any person imprisoned in gaol on mesne process in any civil action, or upon execution founded on a proper action of debt, covenant, contract, or promise, shall be admitted to the liberties of the gaol yard; such prisoner first giving bond to the sheriff of the County in which he shall be imprisoned, with one or more sufficient sureties, being freeholders resident within this State, to be bound jointly and severally in such sum as the sheriff shall direct, with a condition in the same bond, underwritten in the form following," &c.

The latter section provides, "that when the condition of any bond legally taken as aforesaid, for admitting a debtor to the liberties of the gaol yard, shall be broken, such bond shall be assignable to the creditor or creditors, who may maintain action thereon in his, her, or their own names, and shall be entitled to all the privileges and advantages thereon, to which the sheriff or other officer taking the same would be entitled if the action were brought by him. And no action shall be maintained against any officer taking

such bond, for an escape, or other cause mentioned in the condition thereof, unless the creditor or creditors shall have sued the bond taken by such officer and assigned as aforesaid, and be unable to recover the debt or damages, if the sheriff or other officer who took the bond shall upon demand made assign such bond to the creditor or creditors; and if the signer or signers of such bond shall be unable to satisfy the judgment recovered thereon, or if the creditor or creditors shall not be able to recover judgment on such bond against him, her, or them, on account of the neglect, laches or default of the officer, the creditor or creditors may sue the officer taking such bond upon the original cause of action, and shall recover against him all damages which such creditor or creditors shall have sustained."

The language of the statute is, "that when a person is committed on execution, and the nature of the judgment is bailable, he may be admitted to the liberties of the gaol yard; that the sheriff may take a bond, with one or more sufficient sureties, conditioned that the prisoner shall not depart the liberties unless lawfully discharged; that in case of escape the sheriff may assign such bond to the creditor, who shall be entitled on suit to all the advantages to which the sheriff would be entitled; that no suit shall be brought by the creditor against the sheriff until he has prosecuted the assigned bond; if the signer or signers of such bond shall be unable to satisfy the judgment recovered thereon, or if the creditor is impeded in the recovery of the judgment by the neglect, laches or default of the officer, the creditor may sue the officer taking such bond upon the ori-

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ginal cause of action, and shall recover against him all damages which he has sustained." The one case contemplated by the statute, in which the creditor shall recover, is where the bond has been assigned, judgment rendered against the bail, and the bail proving unable to respond such judgment. The other case is where the sheriff by "his *neglect*" perhaps in assigning the bond seasonably, "*his laches*" in failing to take the bond in the manner prescribed by law, or by "*his default*" in any part of his duty, shall impede the creditor in the recovery of judgment upon the bond. In which cases the sheriff is made absolutely responsible for such damages as the creditor has sustained. But in no case does the statute enable the sheriff to exhibit in defence the facts set forth in the notice.

The only question now is, will the Court listen to the language of the sheriff, or that of the statute? The sheriff says he has once exercised his best judgment and taken bail, which he esteemed and can now prove was sufficient at the time of the execution of the bail-bond; and that although such bail was manifestly insufficient when the creditor prosecuted the bail upon the bond assigned, yet the creditor must be the sufferer. The benefit of the judgment against *Seth Emmons*, the original debtor, is totally lost. But he has done his duty. It was not his fault, but the creditor's misfortune, that he esteemed *Lysander Richardson*, the bail, to be sufficient to respond damages upon the bond in case of escape.

The language of the Legislature, as expressed by the statute, is—

Mr. Sheriff, you may admit prisoners to the liberties of your gaol yard. You may take a bond for that purpose. You are made the sole judge of who shall be bail, and his or their sufficiency. But see to it that you take sufficient sureties, freeholders resident within the State, to secure the creditor in case of escape. The sufficiency of your bail shall be tried. Assign the bond or not, at your election. If you neglect or refuse to assign the bond, you must pay the original debt and damages to the creditor. If you assign the bond, and the creditor brings suit upon it, recovers judgment, takes out his execution, commits the bail to prison, or a *non est* is returned on the execution, and the judgment remains unsatisfied, the insufficiency of the bail you have accepted is fairly and fully proved; you must then pay the creditor yourself. And, as if the Legislature meant to guard against every possible evasion of the sheriff, or, if you impede the creditor after you shall have assigned the bail-bond by your neglect, laches, or default, you shall respond the damages yourself. In a word, look, Mr. Sheriff, to the sufficiency of the bail you accept, for you shall, in all events, answer for its responsibility.

A contrary doctrine to this held in the statute, it might readily be shewn would be attended with manifest injury to creditors. Make the sheriff, as may be contended for, a judge of the sufficiency of bail for the liberties of his prison, how much *bona fide* debt might be lost through the misconduct of a designing officer conniving with imprisoned debtors.

In an equitable view of the subject, to consider the sheriff and creditor both as innocent: Here is a

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loss to be sustained by one of them. Who is to bear it? The creditor who has at great expense by course of law been endeavouring to compel his debtor to pay an honest debt, who never was consulted as to the acceptance of the bail, and had no control over the subject of admitting his debtor to bail; or the sheriff, who was the principal in the transaction?

Nathaniel Chipman, for the defendant. The statute does not give an entire discretionary power to the sheriff in the acceptance of bail for the liberties of the gaol yard. It defines the bail to be accepted, viz. "*freeholders resident within the State.*" Here is a rule prescribed to the sheriff. Here is the criterion of the sufficiency required by the statute; and here is the sufficiency set forth in the notice under the general issue.

When the sheriff had once accepted as bail "one or more sufficient surety or sureties, being freeholders resident within the State," he had effectually done his duty. The creditor had all the security required by the statute. Nothing could be more proper in the trial of the issue in an action instituted against the sheriff, than for him to give the very terms of the statute prescribing his duty in his notice in justification. Such justification would operate in a plea in bar.

It is said a loss is to be suffered by one of two innocent persons, the sheriff or the creditor; and that in an equitable view it will be unjust for the latter to sustain it.

I am not prone to argue from the hardships which may be suffered by parties in the determination of a

moot point; but in reply to the popular harangue of the plaintiff's counsel, it may be inquired if it is not equally *hard* upon the sheriff? Compelled by the statute, and even the constitution, to take bail of a certain description modified by the statute, for the liberties of the gaol yard, exposed to an action or liable to impeachment if he refuses, is it not hard, that when he has strictly observed his duty, accepted the bail required by the statute, and the bail should chance to be unable to respond the judgment rendered on the bond, to be made absolutely liable for all damages? Suppose a sheriff should accept the bail required by the statute, and the week afterwards the bailor should become bankrupt. Has the sheriff in such case any power to secure himself? Could he have any process against the bankrupt? Could he again close his prison doors upon the debtor, and demand new bail? Would not the statute, if it contemplated the sheriff as liable in the mode and to the extent contended for, have provided some process whereby the sheriff might secure himself? In most governments there is some peculiar indulgence shewn to their public officers, and in all governments, when they can shew they have done their duty precisely as prescribed by the Legislature, the courts of law will protect them.

Marsh. The whole matters in contest rest here. Are the facts stated in the notice under the general issue, such as could have been *well* pleaded in bar?

It may be determined by this concise view of the subject:

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The sheriff accepted *Lysander Richardson* as a sufficient surety in a bail-bond for admitting *Seth Emmons* to the liberties of the gaol-yard. The bond has been assigned to the creditor, *Samuel Udall.* He has commenced a suit, and recovered judgment on the bond. The execution has been delivered to the same officer, who accepted *Richardson* as bail, and he himself has returned a *non est* as to person and property. Is it legal or even expedient, that the same officer should now be permitted to say in justification, that *Lysander Richardson* is *now* a man of sufficient property to respond the judgment? for he is certainly precluded by his return, his own official act, from saying to the contrary. Could the sheriff have well pleaded such justification in bar?

The Chief Judge delivered the opinion of the Court.

It is the opinion of the Court, that the facts proferted in the notice under the general issue cannot be admitted in evidence to the Jury.

The sheriff is compelled by the statute to admit prisoners committed upon execution founded on a proper action of debt, covenant, contract or promise, to the liberties of the gaol yard, taking a bond with sufficient surety or sureties, being freeholders resident within the State, with certain conditions prescribed in the form inserted in the statute, the principal of which is, that the prisoner shall not depart the liberties of the gaol yard, unless lawfully discharged. If an escape is made, the statute restri the creditor from bringing any suit against the she until he hath applied to him for the assignment

such bond. If the sheriff assign the bond to the creditor, he must institute a suit upon it against the bail. If bail proves *sufficient* to respond the judgment, no action will lie against the sheriff. None is necessary. But if *insufficient*, the action then lies against the sheriff. And what more ample proof of the utter insufficiency of such bail can be expected than what is found in the return of *non est* by the same sheriff made on the execution against the bail?

To say, that at the time of taking the bail, the bailor *was* sufficient, and to make his being a freeholder resident within the State at the time of the execution of the bond, a criterion of his sufficiency, would be to evade the statute. The sheriff must take such bail as is not merely sufficient at the time of executing the bond, but such *as will be sufficient to respond the judgment.* Even if the bail possessed ample freehold, subject to the creditor's execution, landed estate might not satisfy the creditor. When he imprisoned the original debtor, nothing but money would satisfy the creditor if he insisted upon it. He might perhaps have satisfied his original execution by levying it upon lands. He preferred imprisoning the debtor *Emmons* in order to obtain the money, and he has an equal right to insist upon money from the bail.

The meaning of the statute is plain. The sheriff shall at his own risk take such bail for prisoners admitted to the liberties of the gaol yard, as in case of escape shall be sufficient to satisfy a judgment in favour of the creditor in money.

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The cause went to the Jury merely for the assessment of damages, which the Court directed the Jury to assess upon the damages and costs recovered by the plaintiff in his former suit against the bail, together with the officer's fees for the commitment of the bailor upon the *alias* execution, with simple interest.

Charles Marsh, for plaintiff.
Nathaniel Chipman and *Titus Hutchinson*, for defendant.

PRESENT,

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

MARTHA WENTWORTH, Appellant,
against
JOHN ALLEN, Appellee.

The collector of a proprietor's tax is not obliged, in his advertisement for sale, to annex to the name of each delinquent proprietor such sum as is assessed on his right or share, but may mention the amount of the tax on each right *generally*, and then insert a list of the delinquents.

EJECTMENT. This was an action of ejectment wherein the plaintiff demanded seisin and possession of a certain tract or parcel of land, lying in the north-east corner of *Stockbridge*, *Windsor* County, containing five hundred acres, which tract was originally granted to *Benning Wentworth*, late Governor of *New-Hampshire*, as by reference to the charter and chart of *Stockbridge*, may more fully

appear; the same land being devised to the plaintiff by the said *Benning Wentworth;* but the defendant entered and amoved, &c. *ad damnum.*

Plea, not guilty. Issue joined, and put to the Jury.

Plaintiff's evidence.

First. Copy of the charter of *Stockbridge*, dated *July* 21, 1761.

Secondly. Copy of *Benning Wentworth's* will, dated *November* 6, 1769, probated 1770, by which he devised all his lands to the plaintiff.

Defence.

The defendant offered in evidence a deed from the collector of a proprietor's tax, conveying to him the land demanded, and stated that there had been a legal sale of said land for the non-payment of a tax assessed by the proprietors of *Stockbridge* at a legal meeting, and moved to accompany the deed with exhibits of the proceedings of the proprietors.

Daniel Farrand, for the plaintiff, objected to the proceedings of the proprietors being read to the Jury; for that it appeared by the charter, that the land in question was located, or rather granted in severalty to *Benning Wentworth*, the devisor, and therefore the land not being held in common with the other proprietors, they had no right to levy a tax upon it.

SMITH, Judge. I am for excluding the proceedings of the proprietors. I conceive they had no

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power to levy a tax on the lands demanded in the declaration.

Chief Judge. I am for admitting the proceedings of the proprietors in evidence. Those tracts of land which by the *New-Hampshire* charters are uniformly reserved or granted to Governor *Wentworth*, though they are not subject to an after division by the proprietors, have ever been considered by this Court as amenable to the assessment of proprietary taxes.

The Court being divided, the evidence was admitted.

The defendant now proceeded to shew, by the deposition of *David Russel*, keeper of a land-office, the publication of the warrant for the warning for the proprietors' meeting. By the same deposition it appeared that the creditor had legally advertised the assessment of the tax. He then exhibited a *Windsor* newspaper, in which was inserted the collector's advertisement of the time and place of the sale of lands of delinquents in *Stockbridge*, and proved by the same deposition that the same publication had been made in other papers, agreeably to the directions of the statute.

He then read certified copies of the proprietors' records, which shewed that the tax had been regularly assessed.

He then offered to read the collector's deed.

Jacob Smith, for the plaintiff, objected to this deed going to the Jury. He read part of the third section

of the act regulating proprietors' meetings, passed *March* 9th, 1787; "And in case any part of such rate shall be unpaid thirty days after the last time of such publication, it shall be the duty of such collector to publish in the papers, and for the time before mentioned, the *names of the grantees upon whose right default of payment has been made, and the sums due thereon.*"

Vermont Stat. vol. 2. p. 317.

Mr. *Smith* said that he grounded his objection to the deed upon the irregularity of the notice given to the delinquent proprietors in the advertisement exhibited. The collector's advertisement for sale should have set forth the names of the delinquent grantees or proprietors, and the sum assessed on each set against the name of each, that each one might be availed of the sum which he had to pay. That the collector in the present publication had only set forth the amount of the tax, and stated generally that it had not been paid by the proprietors hereafter mentioned, and then inserted a list of their names without annexing to the name of each delinquent the specific sum assessed upon his land.

Sed per Curiam. In a proprietor's tax the land is assessed by equal rights, each holding by his tenure *per meum et tuum.* The sum to be paid by each is therefore equal, and there is not that necessity of annexing to each proprietor's name the sum assessed upon his share, as there is in a state, county, town or parish tax, where the taxes are to be responded by owners of land held in severalty and in unequal quantities. It is sufficient that the collector states generally in his advertisement the amount of the sum

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assessed on each right or share, and then mentions the delinquents' names, whose rights or shares will be sold unless the taxes are paid.

Let the deed be read to the Jury.

The plaintiff had leave to enter a nonsuit.

Daniel Farrand and Jacob Smith, for plaintiff.
—— ——, for defendant.

WILLIAM RICE, Sheriff of Windsor County,
against
JOHN POLLARD *et al.* Appellees.

A promise made by a sheriff to a debtor, within the liberties of the prison, "that if he escaped he would not sue him until he had first prosecuted the bail," will not operate a defeasance of the bail-bond, though the principal be sued at the same time with the bail.

PLAINTIFF declared in plea of debt on bail-bond made and executed to him in his capacity of sheriff by the defendants for the admitting *Pollard* to the liberties of the gaol yard. Bond in the usual form, and escape alleged.

Plea, *non est factum*, with notice by the defendants under the statute, that they should rely in their defence on the following special matter, *videlicet*:

That when the said *Pollard* was so imprisoned as in said declaration set forth, and before said *Pollard* committed any escape, the plaintiff had promised the defendant *Pollard* that in case of his escape he would not prosecute him upon the bail-bond until he had first prosecuted *Seth Emmons*, the other defendant.

Nicholas Baylies, for the plaintiff, objected to the facts set forth in the defendants' notice going in evidence to the Jury.

We consider it now as settled by a recent decision of this Court, that the notice to be given under the general issue provided by the statute, is but a summary mode of pleading in bar, and those matters which may be demurred to in a plea in bar may be objected to in the notice.

The whole matters set forth in the notice are irrelevant, and could not have been well pleaded in bar.

For there is no consideration to the promise set forth in the notice; and if there had been a consideration the promise could not defeat the bond.

Show. Rep. p. 43. *Salk. Rep.* vol. 2. p. 573. *Ayloff* v. *Scrimshaw*. *Term Rep.* vol. 2. p. 24. *Heathcote et al.* v. *Crookshanks*.

Titus Hutchinson, for defendants. The cases cited do not apply. In the cases both in *Shower* and *Salkeld*, the cause of action had arisen at the time of the promise. Here was no action which had accrued. No action had or could accrue to *Rice* until *Pollard* had escaped, and this escape was the consideration of the promise set forth in the notice. The facts in the notice traverse the declaration in the most substantial points. We concede that if *Pollard* had broken his bonds by escaping from prison before the promise made, it would have been null and void.

Charles Marsh, for the plaintiff. I apprehend that the statute merely gives parties the liberty of giving

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notice of any matters which may be pleaded specially. The expression of the statute is "*special matters.*" We say these matters in the notice could not have been pleaded specially.

First. Because the promise set forth in the notice is grounded on no consideration.

To this point the case in *Salkeld's Reports, Heathcote et al.* v. *Crookshanks*, has been read.

But if the Court can get over the want of consideration, such promise, say the authorities, is no defeasance of a bond. It could not therefore be pleaded in bar.

Whether such promise is made before or after the action accrued, is immaterial. The very facts stated in the notice shew that there was no release. *Rice* told the defendant *Pollard*, that if he escaped he would not prosecute him on the bond until he had first prosecuted *Emmons*.

If the subject matter of a statute notice under the general issue could not have been well pleaded in bar, such matter may be avoided on trial by parol demurrer to the evidence offered in support of it.

SMITH, Judge. I am against the admission of the matters proferted in the notice. Exception to the evidence under the notice can be the only consistent mode to avoid such impertinent matter. The defendant can give notice only of such special matters as would prevail in bar, not such as would be demurrable. The matters in the notice, if pleaded in bar, would be clearly demurrable.

Chief Judge. I am of the same opinion.

Verdict for the plaintiff.

Charles Marsh and *Nicholas Baylies*, for plaintiff.
Titus Hutchinson, for defendant.

PRESENT,

ENOCH WOODBRIDGE, *Chief Judge.*
LOTT HALL, *NOAH SMITH*, } *Assistant Judges.*

SOLOMON WADDAMS, Appellant,
against
FREDERICK BURNHAM, Appellee.

PLAINTIFF declared in debt, that the defendant render to him the several sums of 37 dols. 42 cts. 6 dols. 55 cts. and 27 dols. 42 cts. making in the whole 71 dols. 39 cts. for several judgments recovered by the plaintiff at the Court of Common Pleas holden at *Litchfield*, within and for the County of *Litchfield* and State of *Connecticut*, on the fourth *Tuesday* of *March*, 1798; which judgments are in full force, and in no part satisfied. Profert made of the record of the Court in *Connecticut.*

To plead several distinct facts, all tending to one defence, is no departure in pleading.

The defendant craved *oyer* of the records; which being read to him, it appeared, that *Burnham* was set forth as being of *Pomfret*, in the County of *Windsor* and State of *Vermont.*

In a plea in bar to debt on a foreign judgment, it is necessary to aver, that the judgment was recovered contrary to the *lex loci.*

Defendant then pleads in bar; because he says, that the said *Solomon Waddams*, at *Goshen*, in the County of *Litchfield* and State of *Connecticut*, on the 24th of *April*, 1797, purchased out the two writs upon which the judgments in the plaintiff's declaration mentioned were rendered, signed by *Adino Hall*, Justice of the Peace, which writs were made returna-

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ble at and before the County Court then next to be holden in *Litchfield*, within, &c. on the third *Tuesday* of *September* then next, which writs were brought for the recovery of damages for the non-performance of certain promises therein alleged; and afterwards, on the 25th of *April*, in the year aforesaid, the said *Solomon Waddams*, by *Timothy Buel*, a pretended constable of said *Goshen*, caused each of said writs to be served by attaching on each *an old chair*, which were turned out by the said *Solomon Waddams*, at his the said *Solomon's* dwelling-house in said *Goshen*, as the property of the said *Frederick Burnham*, and left copies of the said writs at the dwelling-house of the said *Solomon Waddams*.

And the said *Frederick Burnham* further says, that at the time of the pretended service of the said writs, and for a long time before, viz. for the term of twenty years next preceding the time of the pretended service of said writs, he lived and resided in the town of *Pomfret*, in the County of *Windsor* and State of *Vermont*, and not in any part of the State of *Connecticut*. That the said chairs pretended to have been attached on said writs and turned out by the said *Solomon Waddams* as aforesaid, were not, at the time of said pretended attachment, nor were they ever the property of him the said *Frederick*, nor had he at that time any property of any description in the said State of *Connecticut*. *Et hoc est paratus verificare*. Wherefore, &c.

To this plea the plaintiff demurred, and for causes of demurrer set down the following, viz.

First. That the said plea is double, alleging two separate and distinct facts, having no legal connec-

tion; for that the said plea alleges, that the said *Frederick*, at the time of the service of the said writs, was not an inhabitant of the State of *Connecticut*, but resident in *Pomfret*, *Windsor* County, State of *Vermont*. And it also alleges, that the property attached was not the estate of the said *Frederick Burnham*.

Secondly. It does not appear by said plea, but that the said writs were served conformably to the laws of the State in which said judgments were rendered, or but that the Court of Common Pleas in the State of *Connecticut* had jurisdiction of said cause.

Thirdly. The said plea is hypothetical, uncertain, and without legal form.

Joinder in demurrer.

Daniel Buck, for the demurrant. This plea in bar is double. Here are two issues tendered in the same plea.

HALL, Judge. According to my conception of the law, that duplicity in pleading which the law is said to abhor, exists when separate and distinct matters, which would constitute distinct defences, are pleaded. But when ever so many facts are combined in the same plea, all going to prove one defence, there is no departure in pleading.

In this case the two facts set forth in the plea in bar go to shew that the Court in *Connecticut* had no jurisdiction of the causes in which the several judgments declared upon were rendered; and this is one entire defence, and no duplicity in pleading.

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Chief Judge. It is true, duress and accord and satisfaction cannot be joined in the same plea; but even this dictum of the book shews, that accord and satisfaction, distinct facts, may be coupled in the same plea, both going to make one entire defence, which would avoid the action. There is in such case no departure, and I can conceive none here.

Buck. We shall now endeavour to shew, that the two facts in the plea in bar are not connected; and therefore, with deference to the opinion of the Court, this present plea is not within the doctrine laid down by the bench.

If we should have carved an issue to the facts pleaded in bar, could we have coupled the facts of the defendant's being resident in *Vermont*, and his having no interest in the property attached, in the same issue? Would there not have been duplicity in our traverse. In legal acceptation, accord and satisfaction are but one fact, that the party has agreed to accept a sum in discharge of his demand, and is satisfied with it. In truth, it is the simple fact of satisfaction that is alone pleaded, and relied upon in the plea. The accord is mentioned only as the inducement to it, and never can be pleaded *safely* alone. Therefore the elementary writers say, that accord is an agreement between two persons at least to give or accept something in satisfaction of a trespass, &c. done by one to the other. This agreement, *when executed*, may be pleaded in bar to an action for the trespass; for in all personal injuries, the law gives damages as an equivalent, and when the party accepts of an equivalent there is no injury or cause of com-

Bac. Abr. vol. 1 p. 41.

plaint, and therefore present satisfaction is a good plea. But if the wrong doer only promise a future satisfaction, the injury continues until satisfaction is actually made, and consequently there is a cause of complaint in being, and if the trespass were barred by this plea, the plaintiff could have no remedy for a future satisfaction; for that supposes the injury to have continuance.

But we shall rely principally upon our second exception: that it does not appear but that the two writs were served conformably to the laws of the State in which the judgment was rendered, or but that the Court in *Connecticut* had legal jurisdiction of the same.

Certainly the law on this subject has been settled beyond controversy. In a plea in bar to a debt on a foreign judgment, it is necessary to set forth the laws of the country wherein such judgment was rendered, that the Court may determine whether the judgment has been legally obtained. The case of *Mostyn* v. *Fabrigas*, *Cowp. Rep.* p. 161. goes the full length to shew the high respect the *English* Courts entertain for foreign judgments. It is repeatedly said, in this celebrated case, that the laws of a foreign country must be pleaded.

Chief Judge. It is a point settled, that when debt is brought upon a foreign judgment rendered by *default*, the Court will go into the consideration of such judgment; and, if it appears such judgment was surreptitiously obtained, they will not render judgment upon it.

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Buck. There is another view of the subject: if the two stated facts are true, and may be embraced in one plea, yet they cannot be taken advantage of in a plea in bar to an action of debt on judgment in this Court, or even in that in *Connecticut.* When the actions upon which our judgments are predicated were entered in the Court of Common Pleas in *Connecticut*, insufficient services might have been pleaded in abatement there, or might have been cured by personal appearance of the party in Court, and imparlance, and certainly want of service of the original writ would have been the subject of error. But the writ of error must have been brought in *Connecticut.* This Court would not reverse a judgment rendered in another State by writ of error.

Titus Hutchinson, contra. Here are three exceptions in demurrer to the plea in bar. The first has been overruled by the Court, the last has been abandoned by the counsel.

As to the second, which states in substance the necessity of shewing in the plea in bar, that the facts stated therein are against the laws of *Connecticut,*

We reply, that we cannot find a dictum in the books in point, but many passages to induce us to believe it is not necessary. The case cited from *Cowper's Reports* merely shews, that the Courts in *England* will take notice of foreign laws, so far as to consider them operative in relation to contracts made under them, and that the Court must assist the Jury in determining what such foreign laws are. The whole opinion of the Judge goes only to shew, that the King's Bench will inquire into the jurisdiction of

minor and unappellant Courts, pertaining to the empire; as in the case of the steward of a college, which we find in the same authority.

If it be necessary to plead the laws of *Connecticut*, this follows, that we must plead law and fact in one plea, which would be fatal.

J. Hatch Hubbard, against the demurrer. The only question not abandoned or overruled is, whether it is necessary to bring the law of the State of *Connecticut* upon the record in our plea in bar.

We say the gentleman has not and cannot shew any case decided, or the dictum of a single Judge, that it is necessary to plead a foreign law. *England* is a great commercial country, and frequent are the actions tried in the *English* courts of law upon contracts made in various foreign countries. The books abundantly shew, that upon the trial of such actions the laws and customs of the several countries where such contracts have been made are allowed to be shewn in evidence, and to regulate the decisions of the Courts on such contracts. But are those laws and customs ever pleaded, or spread on the record?

In our plea in bar, we offer to verify certain facts, which, if true, are sufficient to shew that our plea is good. If the verbal statement we have given of the laws of *Connecticut* be correct, which does not seem to be denied, and we had set it forth in our plea in bar, the same gentleman would have demurred, and alleged, that we had made in lieu of a double, a treble plea; two of facts, and one of law: for certainly if the law of *Connecticut* had been spread on the record, it would have been an issuable point, and the Jury

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whose province it is to try facts would have had to try law.

It is said, that in the case of *Mostyn* and *Fabrigas* it is repeatedly laid down, that a foreign law should be pleaded. This is certainly a mistake. By recurring to the report the contrary will appear. The matter there insisted upon by the counsel for *Fabrigas* is, that if *Mostyn* was that sacred person as Governor or Judge, he ought to have pleaded it. It appears, from all the arguments and points in this important case, that no one of the learned counsel ever maintained that *Mostyn* ought to have pleaded the laws of *Minorca*.

Buck. It appears that *Mostyn* pleaded that what he did was in pursuance of the laws of *Minorca*. In the present plea in bar there is no allusion to any law whatsoever.

HALL, Judge, to the defendant's counsel. The plaintiff says, that you have not stated in the plea in bar, that the facts therein relied upon are contrary to or have any connection with the laws of *Connecticut*.

Hubbard. If we have stated the necessary facts, it is not incumbent on us to state the law. We consider the law as resulting from those facts.

We can shew the case of the Duchess of *Suffolk's* will, tried both in *France* and *England*. The foreign law was not pleaded in that case. In no case has the law of a foreign country been pleaded.

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HALL, Judge. In a plea in bar to debt upon a foreign judgment, I hold it necessary to aver at least that the judgment was obtained against the law of the country where such judgment was rendered. The facts disclosed in the present plea are not averred to be against any law.

Chief Judge. I am in opinion with Judge HALL.

SMITH, Judge. I am not settled in my opinion.

Plea in bar insufficient. *Respondeas ouster* awarded.

Daniel Buck, for the plaintiff.
Titus Hutchinson and *J. Hatch Hubbard*, for defendant.

SELECTMEN of Windsor
against
STEPHEN JACOB, Esquire.

A deputy sheriff being an inhabitant of a town, is not therefore disqualified from serving a process by summons in favour of the corporation.

SUMMON *Stephen Jacob* to answer unto *William Hunter et al.* selectmen and overseers of the poor of the town of *Windsor*, &c.

Plea in abatement: For that the action is brought by the plaintiffs for the benefit and behalf of the inhabitants of the town of *Windsor*, and the writ is served by *Stephen Conant*, deputy-sheriff, who is an

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inhabitant of the town, whereas the writ ought to have been served by some disinterested officer.

Vermont Stat. vol. 1. p. 61.

Jacob Smith, for the defendant. By the 24th section of the judiciary act it is provided, "that every writ and process issued as aforesaid, shall be directed to the sheriff, his deputy, or some constable of the town where the service is to be made; except where both sheriff and constable are parties or *interested*, in which case the writ or process may be directed to, and the service made by the high bailiff, or any disinterested constable within the County, who shall be therein named. And in case no such sheriff, deputy-sheriff, or other officer as aforesaid, can be seasonably had, the writ or process may, by the authority issuing the same, be directed to an indifferent person being named."

We contend that the sheriff's deputy serving this writ is so far interested in the event of the suit, that he was incapable in law of doing the service. The judgment recovered in this action will enure to the treasury of the town of which he is an inhabitant, and if the suit fails, a proportion of the costs is to be responded by a tax levied on his person and property. This interest is direct; and if not direct, such an interest as in analogous cases excludes a person thus situated from testifying; for to discover the extent of the meaning of the word "*interested*," as used in the law, we must apply ourselves to the decisions in other instances, where the term is mentioned.

In an action against the hundred upon the statute of *Wilton*, the hundredor by common law could not be a witness.

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So on an indictment against a County for not repairing a bridge, an inhabitant of the County cannot be a witness.

Indeed it has been uniformly ruled in this Court, that in an action against a town for damage occasioned by the want of repair of any highway or public bridge upon our act for regulating highways, &c. the inhabitants cannot be admitted to testify, because they are interested. Is not the interest here the same? The law does not specify to what amount the sheriff's interest shall be, but incapacitates him from the service of a writ where he is any wise interested.

Vermont Stat. vol. 1. p. 452.

In pursuance of this honourable delicacy in the Legislature to keep all the streams of justice pure, the act designates other officers, to wit, the high bailiff, or any disinterested constable within the County; and if neither of these can be readily procured, to avoid the impure services of an interested officer, the magistrate signing the writ is empowered to direct the service to be done by any indifferent person.

Amasa Paine, for the plaintiffs. We consider the interest of the officer serving this process, if any, to be so trivial, that it may be classed among the *de minimis* of the law.

Anciently, it is true, a hundredor in an action upon the statute of *Wilton*, was not admitted to testify; but this over-rigid juridical practice has been long since done away by the statute of *George* II. chap. 16.

It was never decided, only *doubted*, whether an inhabitant of a County could not be a witness on an indictment for not repairing a bridge.

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The truth is, the best systematic writers inform us, "that no general rule can be laid down, but that every case must stand on its own particular circumstances, whether the interest be of that nature, or so considerable as by presumption to produce partiality in the witness." *Bac. Abr.* vol. 2. p. 589.

But how do the decisions respecting the competency of witnesses apply in this case?

Is there not a wide difference in the caution to be observed by the Court in the admission of a witness, whose interest, however remote, or whose prejudices, imbibed by living in the litigating corporation, might imperceptibly to himself bias him to give a colouring to his testimony, and the caution to be observed by the Court respecting an officer doing a mere ministerial act.

If the process had been by attachment, it might possibly be said to be unsafe to put the person or property of the defendant under the control of an inhabitant of the corporation: but here the service was by summons.

Smith. We consider the rules of law respecting the competency of witnesses as relative to their interest in the success of a cause, to apply forcibly for the purpose to which they were cited, which is merely to shew the quantum of interest which the law regards; and we learn that the law notices an interest in action upon the statute of *Wilton*, much more remote than that now in question. The officer in the present case is a man of property, and renders a considerable tax to the corporation: but it is laid down in the books, that though the hundredor be

poor, and *pays no taxes* or parish duties, he shall still be excluded, for when the money comes to be levied he may be worth something.

It is objected, that the common law practice under this statute has been done away by the statute of *George* II. c. 16. A question of magnitude might here arise, how far the common law brought by our *English* ancestors into this country, can be controlled by a *British* statute, passed more than a century after their emigration. If this be the case, the *British* Parliament have, notwithstanding our declaration of independence, a power to alter our common law at will. The act of our Legislature adopts the *common* and not the statute laws of *England.*

It is further objected, that the officer's interest cannot have so prejudicial an effect as in the case of a witness. We reply, that the legislative will must decide this. The statute must govern; and it is manifest, from an investigation of it, that it pins the sheriff's incapacity upon *his interest*, and that it draws no distinction between a greater and smaller measure of interest. The expression respecting sheriff's incapacity is, "*are parties or interested,*" in the first link of the copula, "*are parties,*" meant to designate a chief, principal, personal interest; and if the statute had stopped here, the construction contended for by our opponents would have been correct; but by the addition of the word "*interested,*" the statute includes all interest, however remote. Further, "where both sheriff and constable are parties or interested," seem to contemplate this very case.

The provision for some "*disinterested constable within the County,*" obviously implies, that all the

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constables within the County may be interested, which would be the case if an action should be instituted against the County. This would implicate in interest the sheriff and high bailiff, and their respective departments with all the inhabitants of the County. Now if the Legislature considered that there is some existing remote interest in the officers of the County and of its several towns, which would not incapacitate them from serving process against the County, why did they provide, that in case these officers were interested, the writ should be served by some *indifferent* person.

Per Curiam. The Court cannot perceive the analogy between the interest which will exclude a person from testifying, and that which will incapacitate an officer from serving process. The interest of the officer seems so remote, that it could not disqualify him from serving the writ.

Judgment that writ does not abate.

Amasa Paine and *J. H. Hubbard*, for plaintiffs.
Jacob Smith, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ORANGE COUNTY, SEPTEMBER TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
NOAH SMITH, Assistant Judge.

JOHN LAZELL, Appellee,
against
PINNICK and MATSON,
Administrators on the estate of DANIEL GILMAN,
deceased, intestate.

THIS was an action of assumpsit to recover the amount of a certain execution and extra costs.

General issue pleaded, and trial by the Jury.

The administrator on the estate of an insane intestate may shew his insanity in evidence in avoidance of his contract.

Jacob Smith, for the plaintiff, stated, that *Gilbert* and *Root* were prisoners for debt in *Orange* County

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gaol; that during their close confinement they produced a memorandum in writing signed by the intestate *Daniel Gilman*, by which he promised to indemnify any person who would become bail for these prisoners for the liberties of the gaol yard; that relying upon the promise in the memorandum, the plaintiff executed the bail-bond; *Gilbert* and *Root* departed the liberties of the prison; suit was commenced on the bail-bond, judgment rendered and execution issued against the plaintiff, which he had satisfied at great cost and expense.

Daniel Buck, for the administrator, conceded a regular judgment against *Gilbert* and *Root*, and that they were prisoners legally committed to the *Orange* County gaol; that the memorandum was signed by *Gilman*, had been exhibited by the prisoners to *Lazell*, the plaintiff; that the plaintiff had become bail for *Gilbert* and *Root*, for the liberties of the prison; that the prisoners had departed the liberties, the bail-bond had been prosecuted, and that the plaintiff had satisfied the judgment. But he stated, that at the time of making the memorandum, *Gilbert*, the intestate, was *non compos*, and offered to produce witnesses to prove it.

Charles Marsh, for the plaintiff, objected to the admission of the witnesses, insisting that by law no man was allowed to stultify himself, and read *Powell on Contracts*, pages 14. and 17. and said he saw no distinction between a person's being disallowed to stultify himself, and his administrators being estopped. He observed, that the law had not pointed out

the degree of insanity, and argued the injury that would arise from a person's possessing the power to stultify himself, or anticipating that his heir or administrator may have the power to avoid his contracts. The admission of evidence to shew the insanity of the intestate, would operate with peculiar severity upon his client; for admitting the insanity of *Gilman*, it had not been even suggested that the plaintiff was privy to it, or *particeps* in any imposition upon the intestate.

Buck cited *Blackstone's Commentaries, Bell's Philadelphia* edition, 1771, vol. 2. p. 291, 292. by which he said it appeared, that although the doctrine, that a man shall not be allowed to stultify himself, is recognised as anciently holden, yet it was allowed to be founded on " loose authorities ;" and although it had been handed down as settled law from the time of *Henry* VI. yet " later opinions, feeling the inconvenience, have in many points endeavoured to restrain it." But Judge *Blackstone* says, that " *clearly* the next heir or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity, and avoid the grant."

He also proceeded to read sundry passages from *Powell on Contracts*, observing that his opponent had garbled the text; but was interrupted by

The Chief Justice. Too much time should not be consumed by counsel in arguing points so clear and so repeatedly decided. It has been ruled by this Court, that even where a person was made drunken, and enticed to sign a promissory note, he was after-

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wards permitted to give evidence of the fact, and thus avoided it. The *English* authorities go no further than to estop a person from stultifying *himself*. The rule is never extended to the heirs, executors or administrators.

SMITH, Judge, concurred in opinion with the Chief Judge; and witnesses to prove the insanity of the intestate at the time of signing the memorandum, were admitted.

Verdict for the defendant.

Charles Marsh, for the plaintiff.
Daniel Buck, for the defendant.

LEMUEL ORCUTT, *ex dem.* JOSHUA WARNER,
against
JONATHAN CARPENTER, Tenant.

If a petit juror is qualified by being a freeholder when put into the town jury-box, his divesting himself of his freehold before drawn and summoned cannot be taken advantage of after verdict, but should have been objected in challenge.

MOTION for new trial. Verdict for defendant in ejectment.

And now, after verdict, and before judgment had and rendered thereon, the plaintiff in said action comes and moves the Court here, that the verdict given upon the trial of said cause may be set aside, and that no judgment may be rendered thereon. Because he says,

That one of the jurors of the panel who tried said cause, at the time of trial and giving in said verdict, *was not a freeholder* in said County of *Orange*, as by law he ought to have been.

Also, for that some juror or jurors of the panel who tried said cause and gave their verdict therein, after the said cause was by the Court delivered to the said Jury in charge to try the issue thereof, and before said verdict was delivered into Court, did converse and speak with others not of the panel aforesaid, of and concerning said cause, and did enter into arguments and conversation with them upon the merits of said cause, how and in what manner the same ought to be determined, and how and in what way said verdict ought to go and be given.

Also for that some juror or jurors of the panel aforesaid, after said cause was given to the Jury in charge by the Court, did divulge, make known and publish said verdict to others not of the Jury, by means whereof said verdict was known to the defendant in said cause before the same was rendered in Court.

Wherefore it is ordered by the Court here, that the counsel for the defendant in said cause shew cause, if any they have, why said verdict should not be set aside, and a new trial granted.

By order of Court,

Isaac Bailey, Clerk.

Jacob Smith, for the plaintiff, in support of the motion, made two points:

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First. That one of the Jury, at the time of the trial and delivery of said verdict in Court, was not a freeholder within the County.

Secondly. That certain of the jurors divulged their verdict before it was delivered in Court.

If a petit juror by any intimation discloses the event of the verdict before it is delivered in Court, it will be considered as a gross violation of his official oath, and the verdict on motion will be set aside.

As to the first point: It was conceded, that *Thomas D. Trussdate*, foreman of the Jury, was a freeholder within the County when his name was put into the jury-box in *Fairlee*, but not a freeholder when summoned, or at the time of the trial of the issue.

As to the second point: It appeared in evidence, that the Jury had retired for consultation to a private room in a public house; that after they had agreed upon and sealed up their verdict, *Swazy*, one of the Jurors, as he was passing through the bar-room, was attentive to a conversation between the deponent and another person. Deponent observed, that he had bet a glass of bitters that the plaintiff would have a verdict in his favour. *Swazy* observed, You had better pay your bet.

Pilsbury, another witness, testified, that he had conversed with another of the jurors after they had agreed on their verdict, near the same place; and though he could not particularize the conversation, he obtained sufficient information from the juror to convince him which way the Jury had determined the cause.

Smith. The qualifications of both petit jurors and talesmen are pointed out by the statute.

Vermont Stat. vol. 1. p. 77.

Section 58. of the judiciary act, directs, "that the clerks of the County Courts, and of the Supreme

Court of Judicature respectively, shall issue a *venire* directed to the sheriff of their respective Counties, or his deputy, commanding him to summon fifteen judicious men, *being freeholders within said County*, to serve as petit jurors in the Court mentioned in said *venire*."

Section 63. "That when it shall so happen that a sufficient number of jurors summoned as aforesaid do not appear, or if by reason of challenges or other causes there shall not be a sufficient number of jurors to make up the panel or panels, the Court shall order the sheriff or other officer to fill up such Jury or Juries by summoning, either with or without a precept, a sufficient number of judicious men, being freeholders of the vicinity." *Vermont* Stat. vol. 1. p. 79.

Section 5. of the act regulating town meetings, &c. provides, "that the selectmen, constable or constables, town clerk, and such magistrates of the town who may be present, *(at such meeting,)* shall agree upon such number of *judicious and discreet freeholders, to serve as grand jurors and petit jurors*, as they shall judge will be the proportion of said town, to attend the Supreme Court of Judicature and County Courts, the year ensuing; which member shall be nominated by said authority, and chosen by the inhabitants present; and it is hereby made the duty of the town clerk to write the names of the persons so chosen on separate pieces, and put them into different boxes, to be kept in his office, provided at the expense of the town for that purpose. Ib. p. 409.

By the same 63d section of the judiciary act it is provided, that the sheriff to whom the *venire* is directed "shall repair to the town clerk's office in every

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such town, and in his presence, or, in case he shall be absent, in presence of one or more of the selectmen of such town, draw out of the box containing the names of the persons nominated by the authority of such town, to serve as petit jurors, the number his *venire* directs him to summon."

Here we see, that wherever the statute touches on the qualifications of petit jurors, it is made indispensable that they should be *freeholders*. The only question which the subtle ingenuity of our opponents can make on this point will be a mere question of time. Ought this disqualification in the foreman to have been taken advantage of in challenge, and is it too late to do it on the present motion after verdict?

We shall shew from the books, that exception to a juror for want of freehold is so radical that we can avail ourselves of it at any time, and that the more usual mode has been to except after verdict. *Barnes' Notes*, p. 453. *Norman* v. *Beaumont*, and p. 455. *Russell* v. *Ball.*

Our second point is so clear, that we shall be very brief in our remarks upon it. We shall merely read a section of the juror's oath: "Your own counsel and that of your fellows you will duly observe and keep: you will say nothing to any person of the business and matters you have in charge but to your fellow jurors, nor will you suffer any one to speak to you about the same but in Court; and when you have agreed on a verdict you will keep it secret until you deliver it in Court."

Whence the repeated injunction in this oath to preserve the consultations and verdict of the Jury an inviolable secret until published in open court, but

because the Legislature conceived that the most injurious consequences to parties would flow from a premature development of their proceedings? And shall we be wiser than the law, and conclude, that what it has considered important is of no moment?

Where the law has prescribed a duty, especially to officers of a court of justice, it is necessary to enforce a rigid performance of it; for a small deviation from a line of duty prescribed leads to a greater, and so on until the law is done away. In the present instance, let this Court sanction the *intimation* given by the jurors of the result of their verdict, and future jurors will proceed from intimations to consultations with the parties, and bribery and corruption will eventually ensue.

Though we do not read it as an authority, we shall cite the opinion held on this subject in a respectable neighbouring State. *Swift's System*, vol. 2. 252.

Nathaniel Chipman, against the motion.

As to the first point, it stands upon the statement the juror was a freeholder in *Fairlee* at the time his name was put into the jury-box by the town clerk, but when summoned and sworn as a juror, not a freeholder.

The statute requires jurors to be freeholders, and that the town clerk shall put the names of such elected by the town upon the nomination of the authority into the box. Here all that was required of the town or town clerk was done; and the question is, whether what was after done disqualified the juror. This must depend on the strict provision of the law. Certainly the juror, by losing his estate, did not lose his

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judgment. Had the town clerk any exercise of judgment in this case? Could he have taken the juror's name from the box after he had divested himself of his estate? Suppose the town clerk in this case might be mistaken, would not the very exercise of his judgment go to the packing of jurors. Should not this judgment rather be exercised by the Court? At what time should the Court exercise this judgment? Surely it would be dangerous to do it after verdict; and though true it is the party might not know that the juror had thus divested himself of his freehold, he might be induced, from his interest in the cause, to make inquiry, and upon such disqualification being discovered, would prefer his exception at the time allowed for challenge.

Here is no corruption in the juror; nothing attempted to be shewn, that the verdict of the Jury would have been different if the supposed disqualified juror had not been on the panel.

The cases cited from *Barnes's Notes* do not apply.

In the case of *Norman* and *Beaumont*, a person answered to a wrong name, and was not *originally returned*. So in the other case of *Russell* v. *Ball*, the son answered for the father, and was not *originally* a juryman.

The principle is, that where a person comes on the Jury surreptitiously, and is not of the original panel, he shall be set aside. But in this instance, he, the very man, was put into the box by the town, drawn by the clerk, summoned by the sheriff, and sworn in Court. Here was no surreptitious conduct. If a person put into the box should be indicted, convicted and punished for an infamous crime, and then drawn,

summoned and sworn here, would be a moral disqualification, and undoubtedly advantage would be taken of it; but in this case there is no turpitude.

The depositions read in support of the second point do not go to shew any divulging of the verdict.

Pilsbury deposes as to a conversation which he cannot detail, but whence he guessed a conclusion that the verdict was for the defendant; and so of the bet of a glass of bitters. Could this have any effect upon a verdict already sealed up? If so, it must be from the jurors discovering by their conduct such partiality as had heretofore disqualified them from sitting in the cause, or that it would disqualify them from sitting if the Court should have sent them to a reconsideration, which cannot be pretended.

Daniel Buck, in support of the motion.

If trial by Jury is a common law right, regulated by statute both in *Great-Britain* and here, the reasonings upon the subject which operate there will apply here with equal force. The cases in *Barnes's Notes*, though they exhibit instances of persons sitting on Juries, who were not originally in the *venire*, yet the reasonings on those cases go to shew, that the objection there prevalent would have equally applied to those jurors returned on the *venire*.

It is here stated, that at the time of the trial one of the panel had not the requisite qualifications of a juror: consequently there were but eleven jurors who returned the verdict into Court. It is certainly not only necessary that the juror should be a freeholder at the time of being put into the box, but at the time of trial. This appears from the statute requiring that

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CALEDONIA COUNTY, SEPTEMBER TERM, A. D. 1801.

ENOCH WOODBRIDGE, Chief Judge.
LOTT HALL, } *Assistant Judges.*
NOAH SMITH, }

STATE *against* A. W.

On an indictment for forgery under the 18th section of the act for the punishment of certain capital and other high crimes and misdemeanors, the promisor of a note alleged by the Grand Jury to have been forged, cannot be admitted as a witness.

THIS was an indictment for forging a promissory note *contra formam statuti.*

On trial the promisor of the note was offered as a witness on behalf of the State.

The counsel for the prisoner objected to his competency.

It has been uniformly decided, that on an indictment for forgery under the 5th *Eliz.* c. 14. the person

injured, or, as the statute expresses it, *aggrieved*, by the forgery, cannot be a witness on the trial. The reason is given by Sergeant *Hawkins* in his *Pleas of the Crown*, vol. 2. c. 46. because he may have an action on the statute.

Our statute against forgery is grounded on the statute of *Elizabeth*, combining the 2d and 7th of *Geo.* II. c. 25. and 22. excepting the punishment of death and certain provisoes relative to the proceedings of the *English* Ecclesiastical Courts. Like the statute of *Elizabeth* it gives a compensation to the *party grieved;* and we therefore consider the payer of a note said to be forged cannot be admitted as a witness in the prosecution of him who is charged with the forgery.

Vermont Stat. vol. 1. p. 337.

Per Curiam. It has been invariably decided in this Court, that "*the party aggrieved*" by a forgery cannot be a witness against a person indicted for the crime. It is a general rule, that where the law gives a compensation to the sufferer by a crime, the person injured cannot be admitted as a witness to convict the accused. It is no exception to this rule, that the person from whom goods are stolen, though entitled to treble damages by the statute, may be admitted to testify on the trial of one charged with the theft; for he is only permitted to testify as to the possession and loss of property, not that the accused stole it, or that it was found in his possession, or indeed to any other circumstances, which may go to culpate the person on trial; and this *ex necessitate rei;* for the possession and loss of valuable property, money for

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instance, may be frequently only known to the owner.

Witness incompetent.

Verdict not guilty.

William Mattocks, for the State.
Tyler, for the defendant.

JACOB DAVIS,
Assignee of the Sheriff of Chittenden County,
against
MATHEW COLE and ALPHEUS MANSFIELD.

The surreptitious antedating of a bond may be well pleaded in bar.

THE plaintiff declared on a bail-bond dated *January*, 1799, executed by the defendants to the sheriff, for the admitting *Cole*, then a prisoner at the suit of the plaintiff, to the liberties of the gaol yard; bond assigned 20th *November*, 1799, and escape alleged before the assignment.

Plea in bar, that the bond was in fact executed 1st *November*, 1800, but antedated to *January*, 1799.

To this plea, plaintiff demurred, and took several exceptions. That principally relied upon was, that the defence should have been by pleading the general issue, and not in bar.

Counsel for the plaintiff. This is a matter of fact, whether the bond was antedated or not, and should,

consistently with all rules of practice, have been inquired of by the Jury under the plea of *non est factum*.

When the defence consists of matters in law, the defendant may plead specially; but where it is purely fact the general issue must be pleaded. *Bac. Abr.* vol. 5. p. 370.

Sed per Curiam. The only reason assigned in the books why the general issue must be pleaded in preference to a special plea, is not for the *insufficiency* of the plea, but because the plea in bar tends to swell the records. It is observable, that though the plea in bar concludes to the Court, yet the plaintiff is abridged of no rights by it; for he may traverse the fact alleged in bar as in the present case he may have traversed the antedating of the bond, and this would draw the point to the consideration of the Jury.

Plea in bar sufficient.

John Mattocks, for plaintiff.
Tyler, for defendant.

Peasely v. Buckminster.

JEDEDIAH PEASELY *against* WILLIAM BUCKMINSTER.

The extra expense in procuring witnesses and employing counsel, the time spent and money necessarily expended in defence of a suit, are not comprehended in the term "*intervening damages*," inserted in the condition of the recognisance for a review.

ERROR. This writ was brought to reverse a judgment rendered by the County Court, *Caledonia* County, *June* term, 1801.

Oyer of the record craved, and plea *in nullo est erratum.*

The history of the cause, and the error assigned, may be collected from the bill of exceptions spread on the record.

The bill states, that *Peasely*, on the 2d *December*, 1800, commenced an action of debt on recognisance against the defendant in error and one *Paul Spooner*, writ returnable to *Caledonia* County Court, *January* term, 1801, demanding 1,000 dollars, which they jointly and severally owed, &c. for that, on the 19th of *July*, 1797, *Buckminster* attached *Peasely* to answer in an action of trespass, and entered his writ *January* term, 1798; which action was continued from term to term until the *January* term, 1799; at which term *Buckminster* recovered judgment against *Peasely*, from which judgment *Peasely* appealed to the Supreme Court, 1799; at which term *Peasely* recovered judgment for his costs against *Buckminster*, and the latter reviewed the cause. "And on that occasion, as surety to the said *Jedediah* that the said *Buckminster* should prosecute his review to effect, and answer and pay all intervening damages and costs, in case judgment should be affirmed," *Buckminster* and *Spooner* entered into the recognisance. That at the *September*

term of the Supreme Court, 1800, *Buckminster* suffered a nonsuit, and thereby did not prosecute his review to effect, and the recognisance became forfeited, &c. *Non est* as to *Paul Spooner*. That *Peasely* entered his action upon the recognisance against *Buckminster*, who suffered a default to be heard in the assessment of damages. And now, at the County Court holden at *Danville*, within and for the County of *Caledonia*, *June* term, 1801, on motion of the plaintiff *Peasely*, a Jury was impanelled to assess the damages in said cause, and said *Buckminster* was permitted by the Court to be heard in assessment of damages; and while the cause was on trial upon the assessment aforesaid, the said *Jedediah Peasely* offered to produce one *Abner Hunt* and one *Thomas Dow* to testify and prove, that after review in the original cause by the said *William Buckminster*, and before and at the next Court to which said cause was reviewed, and at which said *Buckminster* suffered a nonsuit, the said *Jedediah* was at *great expense in procuring witnesses and employing counsel, and was at great charge in time spent and money laid, necessarily laid out in preparing to defend in said cause, besides his fee-bill costs*, which the said *Jedediah* said were *intervening damages*, according to the statute in that case made and provided. To which it was objected, that the intervening damages to be inquired after were such only as were occasioned by said *Jedediah's* being delayed in recovering the sum for which he had recovered judgment against said *William Buckminster*, and not such extra costs and trouble as were not recognised in the fee-bill, and therefore that the evidence offered was not pertinent to the

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inquiry. Nevertheless the said *Jedediah* did insist, that such evidence ought to be received by said Court, and suffered to go to the Jury, which the Court here refused to permit or admit, and declared their opinion here, that the said matters here on the part of the said *Jedediah* produced, ought not to be given in evidence. Whereupon the Jury here find nominal damages only, to wit, the sum of five cents. Whereupon the counsel on the part of the said *Jedediah*, because the matters aforesaid, offered by the said *Jedediah* to be given in evidence as aforesaid, do not appear by the verdict of the Jury aforesaid, the said *Jedediah* requests of the Justices aforesaid, of the Court aforesaid, according to the form of the statute in such case made and provided, this bill of exceptions, which contains the matters aforesaid by the said *Jedediah* ready to be given in evidence as aforesaid, and by the Court aforesaid rejected. To which bill of exceptions the Justices of the Court aforesaid, that is to say two of them, being a quorum of said Court, at the request of the said *Jedediah*, have in open Court, this sixth day of the term, annexed our official signatures and seals.

William Chamberlain.
John W. Chandler.

The question is, has error intervened from the exclusion of the testimony offered on the assessment of damages by the Jury in the County Court.

It is conceded, that *Peasely* had taken out his writ of execution upon the judgment for his costs on nonsuit, which has been returned fully satisfied.

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Per Curiam. The Court have so repeatedly given their opinion on this point, that they decline hearing argument, considering it as settled.

Vermont Stat. vol. 1. p. 54.

The condition of the recognisance, as prescribed by the statute is, "that the party shall prosecute the same to effect, and answer and pay all intervening damages, occasioned to the appellee or reviewee by his, her or their being delayed, with additional costs, in case the judgment be affirmed." The question too frequently made is, what are intervening damages? The statute replies, they are such as are occasioned to the appellee or reviewee by his, &c. *being delayed;* that is, such intervening damages, resulting from the delay, as are occasioned by a material alteration in the circumstances or situation of the party appealing or reviewing subsequent to the entering of the recognisance, such as the bankruptcy or removal of the party beyond process; in which cases, if damages are recovered in final judgment by the appellee or reviewee, the bail must make him good; if costs only, the recognisor must respond them.

In the present case, every security to the reviewee by the recognisance has been effected. The plaintiff in error has taken out his execution for costs, and it has been fully satisfied.

The expense of litigation, the fees of counsel, the waste of time, and other charges incurred in the defence of the original suit, aside of those provided for by the fee-bill, the party must sustain: he bears a misfortune common to every suitor; and surely there would be no propriety in this Court allowing a party in assessment of damages under a recognisance for an appeal or review *indirectly* to tax costs not pro-

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vided for by the fee-bill; much more virtually to avoid the fee-bill in those items of costs which are specially regulated by it.

This Court consider, that the County Court judged correctly, in excluding the evidence mentioned in the bill of exceptions.

And therefore let judgment be entered, that the Court having inspected the record, do find that there is no error in the records and proceedings of the County Court, and that the defendant in error have his costs.

John Mattocks, for plaintiff.
Tyler, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

FRANKLIN COUNTY, DECEMBER TERM,
A. D. 1801.

PRESENT,

JONATHAN ROBINSON, Chief Judge.
STEPHEN JACOB, Assistant Judge.

STATE *against* J. B.

On trial upon an indictment for perjury in swearing falsely to a deposition, the facts stated in the deposition appeared to be true; but after making the deposition the deponent had testified on the stand that they were not true, the prisoner was not estopped by his *viva voce* testimony from shewing the verity of the facts stated in the deposition in his defence.

THIS was an indictment for perjury, in swearing falsely in a certain deposition sworn to before *Jonathan Hoit*, Esquire, one of the Justices of the Peace of *Franklin* County, on the 9th *September*, 1796; which deposition was taken to be used, and was used in a cause then pending in *Chittenden* County Court, wherein one *Lamphire* was plaintiff and one *Brown* defendant. The indictment contained the usual averments of the materiality of the facts sworn to by the

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deponent, and then negated them. And so the grand jurors aforesaid on their oath say, that the said *J. B.* in the testimony given in said deposition, so by him, &c. then and there committed wilful and corrupt perjury, contrary to the form, &c. and against the peace and dignity of the State.

Plea not guilty, and issue to the Jury.

It appeared in evidence, that the deposition was regularly taken by Mr. Justice *Hoit*, sealed up and sent to *Chittenden* County Court, there opened, and read in the trial between *Lamphire* and *Brown*. Before the cause was closed to the Jury, *J. B.* the deponent, was sent for, and made his personal appearance in Court. He was then sworn; and testified that a certain conversation which he had sworn to in his deposition had never happened. He was asked if he had never given a deposition in the cause, and he acknowledged he had, and said, that what he had sworn to in that deposition was undoubtedly true. It appeared that the facts stated in his deposition were material in the cause in issue between *Lamphire* and *Brown*, and that they were true, and consequently what he had sworn to in Court was false.

The State Attorney now contended, that as the prisoner had in open Court solemnly testified to the falsity of the facts stated by him in his deposition, he was estopped from shewing the truth of them in his present defence.

Sed per Curiam. The prisoner is on trial for testifying to certain facts stated in a deposition made by him before a magistrate. The truth of those stated

facts is negated in the indictment, and it appears in evidence that they are true. As a general rule, this is certainly good shewing in defence on an indictment of this nature.

If the prisoner was guilty of perjury in his *viva voce* testimony, he may yet be indicted for it. Perhaps it might have been more correct to have inserted other counts in the indictment charging the prisoner with perjury when on the stand. It would be carrying the doctrine of estoppel very far, to exclude the prisoner from shewing the verity of the facts testified by his deposition, because he falsified them by his *viva voce* testimony in the same cause, and thus to convict him of perjury in swearing to *the truth* in a deposition, and then leave him exposed to another indictment for perjury in testifying falsely on his appearance upon the stand.

The Jury found the prisoner not guilty."*

Levi House, for the State.

Amos Marsh and *W. C. Harrington*, for the prisoner.

* Reported from Judge *Robinson's* minutes.

Hastings v. Powers.

AARON HASTINGS *against* JOSEPH POWERS.

The Court will not on trial order a party to produce a writing *instanter*, under the 57th section of the judiciary act. There must be *due notice*.

THIS was an action brought by the plaintiff, as assignee of the sheriff, upon a bail-bond executed by the defendant jointly and severally with *N. Spafford*, for admitting the latter to the liberties of the prison yard in the City of *Vergennes*.

Plea in bar, that *Spafford* escaped with the consent of the plaintiff.

Replication traversed the fact alleged in bar. Joinder, and issue to the Jury.

In the course of the trial it was proved, that there had been a contract entered into between the plaintiff and *Joseph Beeman*, junior, who held *Spafford's* lands in trust, by which *Beeman* engaged to execute a deed to the plaintiff of such quantity of the land as would amount in value to the debt and costs for which *Spafford* was imprisoned, if the plaintiff would consent to *Spafford's* quitting the limits of the prison; and that this contract was reduced to writing.

Defendant's counsel now moved a rule upon the plaintiff to shew cause why he should not forthwith produce the writing or become nonsuit; and supported his motion by affidavit of *Silas Waterman*, Esquire.

On the question whether rule should be granted, defendant's counsel read the 57th section of the judiciary act:

Vermont Stat. vol. 1. p. 77.

"That the Supreme Court of Judicature and County Courts shall have power, in the trials of ac-

tions at law, on motion, and *due notice* thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, or relative to the action, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery; and if a plaintiff fail to comply with such order to produce books or writings, it shall be lawful for the Court, on motion, to give the like judgment for the defendant as in case of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the Courts respectively, on motion as aforesaid, to give judgment against him, her or them as in case of default."

Per Curiam. The motion cannot in this instance be sustained. The statute requires "due notice to be given." It would operate a surprise on the plaintiff to sustain a motion of this nature made *instanter*, while the issue is on trial to the Jury.

Rule not granted.*

Levi House, for plaintiff.
W. C. Harrington, for defendant.

* Reported from Judge *Robinson's* minutes.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

FRANKLIN COUNTY, JUNE ADJOURNED TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

Ex parte HALL.

A writ of protection *ad testificandum* suspends all civil process as against the subject of it whilst coming to and attending upon Court, with a reasonable time for the witness to return home after the rising of the Court.

HABEAS CORPUS cum causa, returnable *coram nobis*.

The writ was directed to *Nathan Green*, constable of *St. Albans*, commanding him to have forthwith the body of *Abijah Hall*, said to be a prisoner in his custody, with the cause of his detention or imprisonment.

The officer brought the body of *Hall* into Court, and returned as the cause of his detention,

That as constable of *St. Albans* he arrested and now detains the body of *Hall* upon a writ of attachment signed by *Hubbard Barlow*, one of the Justices of the Peace of the County of *Franklin*, (having legal and sufficient authority to sign the same,) and directed to him as constable, to serve and return according to law, which writ was at the suit of *Hall, Crane & Pomroy*, merchants, trading in company under that firm, who demanded in the writ of *Abijah Hall* the sum of six hundred dollars, due on balance of book accounts, and which writ was made returnable to *Franklin* County Court, next to be holden at *St. Albans*, on the second *Monday* of *November*, 1802. Ex parte Hall.

Abijah Hall now moved for his discharge, stating that he is illegally imprisoned.

For that he is an inhabitant of *Platsburgh*, in the State of *New-York*, beyond the process of this Court, where he hath long resided under the protection of the laws of said State. That he came into the State of *Vermont* since the commencement of the present term of the Court, under the protection of the Court, having with him, ready to be shewn in Court, a writ of protection issued by the order, and signed by the Clerk of the Court, dated within the term, and made conformably to law; which writ states, that the personal appearance of the now prisoner is necessary for the furtherance of justice to be had in Court, to give testimony in the cause or action wherein *Zerah Willoughby* is plaintiff, and *Nathan Kinsley*, junior, defendant, on the part of the defendant; and commands all civil officers and others to abstain from executing or serving any civil process upon the body of the now

Ex parte Hall.

prisoner on his way to the Court, during his attendance on Court, and for a reasonable time for him to return to his domicil after the rising of said Court. That the arrest in the return made, and by which he is now holden in custody, was made during the operation, and in disobedience to said writ of protection, against law and in contempt of the Court.

The officer, confessing the said writ of protection, in reply says, that the said *Abijah Hall* ought not to be discharged from his custody, because he says he is not detained contrary to the true intent and meaning of said writ of protection, or the law of the land; for that the cause or action of *Willoughby* v. *Kinsley*, to testify concerning which the said writ of protection was granted and issued, was, on the 19th day of *June*, being the fifth day of this present term of the Court, by order of Court and agreement of the parties, continued to be heard and tried at the next term of the Court; of all which the said *Abijah* was consant: and so the business and matters for which the said writ of protection was granted and issued, as they related to the said *Abijah Hall*, were fully completed and ended: and according to the true intent and meaning of the said writ of protection, the term of this Court, as it related to him the said *Abijah*, had terminated. And for that the said *Abijah Hall*, on the said 19th day of *June*, instead of proceeding directly to his domicil in the reasonable time allowed him by said writ, went in an opposite course from his habitation and home in the State of *New-York*, twenty miles further from *St. Albans*, into the interior of this State, to wit, to the town of *Cambridge*, in the

Ex parte Hall.

County of *Franklin*, where he loitered or went about his private business until the 21st day of *June*, being the seventh day of the term, when he returned to *St. Albans*, and there loitered or went about his private business until the 22d day of *June*, when the arrest under which he is now detained was made; and so he says the said *Abijah Hall* was not, at the time of said arrest, within the protection of the Court under said writ of protection, in that he did not depart home in a reasonable time after the said cause was continued, and after the matters and business for him the said *Abijah Hall* as a witness to do, were fully completed and ended.

The prisoner rejoins, that at the time of said arrest he was within the protection of the Court under said writ of protection; for, protesting that the continuance of the cause of *Willoughby* v. *Kinsley*, according to the true intent and meaning of said writ of protection, was not the rising of the Court, he says, that on the said 19th day of *June*, being the fifth day of the term, immediately after an imparlance had been granted in the case of *Willoughby* v. *Kinsley*, he proceeded towards his domicil in *Platsburgh* aforesaid: but when he came to his boat on the shore of Lake *Champlain*, he discovered the weather to be so tempestuous it was impossible to cross the same on his way home without manifest jeopardy of his life: that the weather continuing tempestuous, it became necessary for him to seek some shelter from the storm until the wind should abate; and he the prisoner, being without money or other means to sustain and support himself in *St. Albans*, went to a near relation's in *Cambridge*

Ex parte Hall.

aforesaid, where he might subsist upon the hospitality of his friends. That on the same 19th day of *June*, he was at said *Cambridge* arrested at the suit of one *Hawley*, and brought to *St. Albans* under such arrest, where he continued under said arrest until the evening of the 21st of *June*, he procured and gave bail in the suit of *Hawley*. That on the 22d day of *June* he again attempted to cross said Lake in his passage home, when he was arrested upon the writ for which he is now in custody. And so he says, that if in any wise he hath departed from the protection of the Court in their writ of protection extended, it has been occasioned by the act of Providence, which the law announceth shall injure no man.

Upon traverse of this rejoinder by the officer, the following witnesses were sworn:

—— *Dunkelly*, Esquire; who testified, that on *Friday*, the 18th of *June*, he came from the *Grand Isle* in a boat with his wife, *Nathan Kinsley* and *Abijah Hall*, to *St. Albans*. *Kinsley* had engaged to bring *Hall* over, and to return him home. That on the *Saturday* following, after the cause of *Willoughby* v. *Kinsley* was continued, they all went to the lake shore to embark; but the waters were so rough and the wind so violent, that it was judged by the party and others present, that the passage to the *Grand Isle* could not be attempted without risk of lives. That *Abijah Hall* appeared anxious to venture; and when the witness declined, he consulted him respecting his going to his brother's in *Cambridge*, and spending the sabbath, saying he had no money to bear his ex-

penses in *St. Albans*. That he did not see *Hall* again until *Monday*, when he was in custody of a deputy-sheriff at the suit of one *Hawley*. On *Monday* the lake was calm, but they waited until *Hall* could procure bail, which he effected late the same evening. On *Tuesday*, as they were preparing to embark, *Hall* was again arrested at the suit of *Hall, Crane & Pomroy*.

Daniel Kinsley, junior, confirmed the testimony of *Dunkelly*.

Thaddeus Rice, counsel for the officer, contended, that the expression in the writ of protection, until a reasonable time after the rising of the Court, must intend until the disposal of the cause for the term in which the prisoner was protected as a witness. That it was so understood by *Hall* himself, who, upon the termination of the suit for the term, went immediately towards home; but being frightened by the gale, he went directly from his course nearly twenty miles into the interior of the State. That it was his duty, if the wind was high, to have tarried on the lake shore until it was calm. In a word, the writ protected him in his most direct course to the Court, whilst there until the business for which he was sent for was concluded, and then in his direct course to the place from whence he came. If he met with an impediment he should have tarried where he was impeded, and at least looked towards the path of his duty. That the writ of protection goes to abridge the rights of honest creditors, and should be strictly construed.

Ex parte Hall.

The Court declined hearing arguments from the opposing counsel.

Per Curiam. Testimony *viva voce* is so much to be preferred to that received through the medium of a deposition, that the Court are inclined to favour the personal appearance of witnesses.

The writ of protection will therefore always receive a liberal construction in favour of the witness covered by it.

An inhabitant of another State has a right to prefer having his controversies settled by the Courts in his own government. He must not be drawn into this State under the ostensible protection of this Court, and be then exposed to be entangled in litigation far from his home, which must ever be attended with augmented expense. For the furtherance of justice and the dignity of the Court, it is better that the plain letter of the writ should be preferred, than any nice construction which the ingenuity of counsel may suggest.

The Court consider, that the writ of protection *ad testificandum* suspends all civil process against the subject of it, *while coming to and attending upon Court, with a reasonable time for the witness to return home after the rising of the Court.*

If the doctrine should prevail, that the writ of protection ceases to operate after an imparlance awarded, or even after final judgment, it would promote litigation; for the termination of the suit might not always be known to the witness. Arrests would follow; and though the failing to prove the knowledge of the termination in the suit would eventually liberate him on

Ex parte Hall.

habeas corpus, yet the litigating the *scienter* would involve the witness in the very litigation which was intended to have been avoided by the writ of protection.

The Court are fully in opinion, that the prisoner must be discharged.

Let judgment be entered, that the prisoner is discharged, and the constable be in mercy for his contempt of the Court.

Thaddeus Rice, for the officer.

William C. Harrington and *Bates Turner*, for the prisoner.

JOSIAH COLONY, Appellee.

against

ALFRED HATHAWAY, Appellant.

Motion for new trial, because one Judge sat alone in the hearing to the Jury, and another member of the Court was not interested, or had been counsel for either party.

VERDICT for the defendant at the last term; when *House* and *A. Marsh*, counsel for the plaintiff, moved for a rule upon *Harrington* and *Rice*, attornies to the defendant, to shew cause why the verdict in said cause should not be set aside and a new trial granted; because the plaintiff says, that one Judge alone presided, and held the Court for the trial of said cause, when in fact the two other Judges of the Court were not interested in the trial of said cause, or had been of counsel for either party.

Rule granted by *Jacob*, Judge, *December* term, 1801.

Colony v. Hathaway.

The facts are: This cause came on for trial the last stated term; the Chief Judge and *Jacob*, Assistant Judge, present; the first Assistant Judge absent, but not interested in the trial of the cause, nor had he been of counsel to either party. The Chief Judge declined giving any opinion in the cause, as he was in affinity with the appellant. Some conversation was held at the bar upon the propriety of Judge *Jacob's* sitting alone; but the Judge observed, that as the parties seemed equally desirous of a trial, the cause might proceed, reserving to the losing party the privilege of having the legality of the proceedings of the Court decided upon a motion for a new trial, to be entered at the present, but argued at the adjourned term, when the absent Judge would be in Court. This was agreed to by the parties, and the trial proceeded.

Vermont Stat. vol. 1. p. 56. s. 7.

The statute provision on which the motion is predicated is, "that if two of the Judges in the trial of any cause shall be interested, or shall have been of counsel for either party in said cause, in every such case one Judge shall hold the Court for the trial of such cause."

And now at this term the motion was argued, *Tyler* and *Jacob*, Judges, present; but the Court being divided, the former Judge for setting aside and the latter for supporting the verdict, the motion did not prevail, and a new trial was not granted.

Rule discharged.

Levi House and *Amos Marsh*, for plaintiff.

W. C. Harrington and *Thaddeus Rice*, for defendant.

State
v.
J. P.

STATE *against* J. P.

THIS was an indictment for perjury *contra formam statuti*, presented to the Court *January* 3d, 1801. Indictment for perjury quashed on motion.

William C. Harrington moved that the indictment might be quashed because the crime is alleged to have been committed the 24th day of *April*, 1797, more than three years from the time the indictment was exhibited in Court.

He relied upon the act for the limitation of suits on penal statutes, criminal prosecutions, and actions at law, passed *November* 6th, 1797. The 3d section enacts, "that all actions, suits, bills, complaints, informations or indictments, which at any time hereafter shall be brought, had, commenced or prosecuted for any crime or misdemeanor, (theft, robbery, burglary, forgery, arson, and murder, excepted,) shall be brought, had, commenced or prosecuted within *three years* next after the offence was committed; and not after the expiration of the said three years." *Vermont* Stat. vol. 2. p. 405.

The Attorney for the State read the 13th section of the same act: "Provided always, and it is hereby further enacted and expressly declared, that this act shall not be construed to extend to or affect any right or rights, action or actions, remedies, fines, forfeitures, privileges or advantages, accruing under any former act or acts, clause or clauses of acts, fall-

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ing within the construction of this act, in any manner whatever:"

Vermont Stat. vol. 2. p. 414.

And the act passed *November* the 10th, 1797, entitled, "an act repealing certain acts therein mentioned;" which act repeals the act for the prevention and punishment of frauds and perjuries, passed *March* the 8th, 1787, and by section 3d provides, "that the aforesaid repealed acts or laws shall be in *full force* as to all matters and things done or transacted during their existence, to which they relate, to all intents and purposes as though this act had not been made; and all such matters may be prosecuted, commenced, done and completed, at any time hereafter, pursuant to the same laws."

Mr. Attorney contended, that though the indictment had been presented to the Court since the passing of the statute of *November* 6th, 1797, cited by the respondent's counsel, and since the passing of the present statute against perjury, yet the crime alleged in the indictment is set forth to have been perpetrated before the existence of those acts. The indictment being *contra formam statuti* must be considered to lie on the statute of the 8th of *March*, 1787, and is therefore sustained by the saving clause of the repealing act, passed *November* the 10th, 1797, to which reference is virtually had in the limitation act passed *November* the 6th, 1797.

Sed per Curiam. It is immaterial under which of the acts against perjury the indictment may be supposed to have been found. The act of limitation, passed *November* 6th, 1797, takes effect in all cases from the exhibition of the indictment in Court. The

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clerk is directed by the 5th section of the same act to make a minute in writing on the indictment, under his official signature, of the true day, month and year when the same was exhibited; and if the crime of perjury is alleged in the indictment to have been committed more than three years before the date of such exhibition of the indictment, the prosecution is limited.

Indictment quashed.

Levi House, Attorney for the State.
W. C. Harrington, for defendant.

ELLICK POWELL *against* BARZILLA BROWN.

EJECTMENT for one hundred acres of land in *Fairfield*, described as Lot No. 10. in the second division of lots laid out and severed to the right of *Joseph Newmarch*, an original grantee under the charter.

General issue pleaded and put to the Jury.

Plaintiff shewed a good apparent title by deed.

Defendant relied upon a title derived from the sale of the land under a proprietary tax, and offered the collector's deed in evidence.

The deed of a collector of a proprietor's tax, however it may be worded, is not even *prima facie* evidence of a legal sale of the land. The proceedings of the proprietors in the assessment of the tax, and the collector's own acts in the levy of it must be first shewn.

Powell v. Brown.

The counsel for the plaintiff objected to the collector's deed being read until the assessment of the tax by the proprietors was first shewn.

Per Curiam. When the deed of a collector of a tax assessed and levied immediately by the State, is exhibited in evidence, and the deed sets forth, that the collector hath in all things pursued the law, it shall be considered as *prima facie* evidence of a legal sale. But this merely casts the *onus probandi* on the adverse party, for the acts of this officer of government may be impeached. But the deed of a collector of a proprietor's tax, however it may be worded, is not even *prima facie* evidence of a legal sale. The law will not render that respect to the doings of the servant of a private corporation, which it pays to the acts of an acknowledged officer of the State.

In the present case the collector's deed cannot be read to the Jury until all the proceedings of the proprietors in the assessment of the tax, and the collector's own acts in the levy of it, be first shewn.

The defendant's counsel now produced the records of the proceedings of the proprietors of *Fairfield.* They set forth, that at a proprietor's meeting *legally warned* for the purpose, &c.

The warrant warning the meeting of the proprietors must be produced, that the Court may be enabled to judge whether it issued agreeably to law.

Plaintiff's counsel insisted, that the warrant for warning the meeting of the proprietors should be produced.

Per Curiam. The warrant warning the meeting of the proprietors must be shewn, that the Court may

be enabled to judge whether it issued agreeably to law.

Powell v. Brown.

Verdict for the plaintiff.

William C. Harrington and *Levi House*, for plaintiff.

Bates Turner, for defendant.

SOLOMON BINGHAM, Junior, *ex dem.* HUBBARD BARLOW and ANDREW BRADLEY,

against

DAVID SMITH, Tenant.

EJECTMENT for 50 acres of land, being part of Lot No. 35. in the second division of lands in *Fairfield*, drawn to the original right of *Daniel Smith.*

Common rule entered. General issue pleaded.

Verdict for the plaintiff.

Defendant's counsel now moved to file a declaration for *betterments*, under the statute passed *November* 5th, 1800.

Vermont Stat. vol. 1. p. 209.

Counsel for the plaintiff objected, and read the act.

Objections to a declaration for betterments cannot be taken in opposition to the filing, but must be made in the common course of pleading to such declaration.

Preamble.

"Whereas many persons have purchased supposed titles to lands within this State, and have taken

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possession of such lands under such supposed titles, and have made large improvements on the same, who, at the time of purchasing, supposed such titles to be good and valid in law; and whereas many of such titles may prove defective by loss of records, the neglect or laches of others in the chain of title, or from other causes, and who, if the strict rules of the common law be attended to, may be turned off from their possessions and improvements on such lands so by them made at great expense, without any compensation or rewards for such betterments:

"It is hereby enacted, &c. That when any person or persons in the actual possession or improvement of lands within this State, who had purchased, or those under whom they hold had purchased a title to said lands, *supposing at the time of such* purchase, such title to be good in fee, and having in consequence of such purchase entered and made improvements on such land, and shall or have been prosecuted and sued for the recovery of such lands before any Court by action of ejectment, or any real or possessory action, and judgment shall be hereafter rendered against such person or persons in possession as aforesaid; such person or persons, against whom judgment shall be thus finally given, shall have right by action to recover of the person or persons in whom the legal title is found, such sum or sums of money as shall be found on the trial of such action, that he, she or they, or those under whom they hold, have made the lands so described in the plaintiff's declaration better or of more value by such betterments than it otherwise would have been, had no such improve-

ments been made thereon, and the mode of process shall be, that the recoveree or recoverees in such action as aforesaid, shall, within forty-eight hours after such judgment, or during the sitting of the Court in which such judgment is had, file a declaration in an action of the case against the recoveror or recoverors for so much money as the estate is made better as aforesaid *in the clerk's office* of the Court in which such judgment was obtained, which shall be sufficient notice to such recoveror or recoverors to appear and defend in such action until the declaration so filed shall be determined."

The counsel for the plaintiff insisted, that the present defendant was not within the purview of the act. The act gives a right of action for what the Legislature have been pleased to style *betterments*, only to persons supposing, at the time of their purchase of the lands, the title to be good in fee. It appeared on trial, that the present defendant comes not within this description, for his title and possession have been considered by the Court and Jury as *in fraudem legis.*

Sed per Curiam. The statute provides, that the declaration for betterments may be filed in the clerk's office of the Court in which the judgment in the action of ejectment has been rendered, and this right is secured to the defendant without leave obtained of the Court.

The question made by the plaintiff may be considered and decided under the pleadings to the decla-

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ration. If the parties elect to bring it in issue at bar, the Court will give it all the consideration it merits. It is certainly a question of some importance.

Declaration filed.

W. C. Harrington, *Elnathan Keyes*, and *Thaddeus Rice*, for plaintiff.

Bates Turner, for defendant,

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JANUARY TERM, A. D. 1802.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

MOSES TAFT, Appellee,
against
The Executors of JOHN THARP, Appellants.

AUDITA QUERELA.

In issuing a writ of *audita querela*, the Judge of the County Court, taking the recognisance, must make record of the same; but it is sufficient that he minutes on the writ, "that *A. B.* &c. recognised to the defendant in the sum of —— dollars, to prosecute the above writ in due form of law, before," &c.

The writ was allowed and signed by two Judges of the County Court. Below the writ the following minute was made:

"*John Palmer* and *Jonathan Green* recognised to the defendant in the sum of 1,000 dollars, to pro-

Pomroy v. Kingsley.

JOHN POMROY *against* DANIEL KINGSLEY.

When an officer attaches a chattel, and leaves it in the custody of the defendant, he so far loses his lien on the property attached, that a second attachment or *bona fide* purchase shall always enure against him.

TRESPASS for breaking and entering the plaintiff's barn in *Burlington* on the 20th of *March*, 1798, and taking from thence a gelding horse of the value of 150 dollars, the property of the plaintiff.

General issue pleaded and put to the Jury.

The plaintiff shewed the property of the horse in himself by purchase from one *William Mills*, on the 10th of *January*, 1798.

The defendant confessed the taking, and justified by shewing that he was constable of *Cambridge*, *Franklin* County; that on the 7th of *October*, 1797, he attached the horse as the property of *William Mills*, upon a writ to him directed to serve and return in favour of *Johnson* and *Hawley*; that the horse had been eloigned from his custody, and that he recaptured him to satisfy the execution which followed the writ of attachment, and that this taking was the trespass complained of.

In the course of the trial it was conceded by the defendant, that soon after the attachment he entrusted *Mills* with the custody of the horse.

The Court now interfered, and observed, that the cause was clearly with the plaintiff.

In their charge to the Jury, they laid it down as a principle of law not to be disputed, that when an

officer attaches a chattel and leaves it in the custody of the debtor, he so far loses his lien upon the property attached, that a second attachment or *bona fide* purchase shall always enure against him.

Pomroy v. Kingsley.

Verdict for the plaintiff.

Nathan Keyes, for plaintiff.
Daniel Chipman, for defendant.

STATE *against* G. S.

INDICTMENT for stealing one bushel of wheat in the chaff, on the second day of *March, Anno Domini one thousand eight.*

Every sufficient indictment must set forth the day, month and year, and in cases of burglary *the hour* when the offence was committed; and though another day may be shewn in evidence on trial, yet it must be a day within the term prescribed by the statute of limitations, and the day set forth in the indictment must be also some day within the statute time, or the indictment will be insufficient.

Verdict guilty.

In the copy delivered to the prisoner the year was rectified to one thousand eight hundred, and the defect was not noticed during the trial.

Defendant now moved in arrest of judgment, that the verdict might be set aside, and he go without day:

Because there is no date of the year set forth in the indictment in which the offence is alleged to have been committed, and if any, that the same is repugnant and impossible.

State
v.
G. S.

Amos Marsh, in support of the motion.

Though the date of the day, month and year in which a crime is alleged to have been committed in an indictment be not material in evidence, it is yet of importance as it respects the records of the Court.

It is also material, as it respects the statute of limitations.

On the first point we observe, that the Court will preserve their records from all inconsistencies, gross inconsistencies at the least.

If the Court should sanction this indictment, and proceed to sentence the prisoner, how would the record appear?

The prisoner may be offered as a witness in some foreign Court. To do away his competency a copy of the record may be produced; and it would appear that the Supreme Court of *Vermont* had convicted a man of an offence alleged in the indictment to have been committed before the *Norman* conquest.

By the common law it has ever been considered as material to set forth in an indictment the day, month and year, and even the hour when the time of day is necessary to ascertain the nature of the offence. *Hawkins' Pleas of the Crown*, vol. 2. p. 325. 334, 335. *Hale's P. C.* vol. 2. p. 177. *Com. Dig.* vol. 4. p. 393.

If the indictment lay the offence on an impossible day, or on a day that makes the indictment repugnant to itself, it is insufficient. *Hawk. P. C.* c. 25. s. 77.

In support of the second point we observe, that section 3. of the limitation act limits the prosecution for theft to six years after the commission of the offence, and not afterwards; and that no dispute might

Vermont Stat. vol. 2. p 406.

arise respecting dates, section 5. provides, that the clerk shall minute on the indictment under his official signature, the true day, month and year in which the same is exhibited in Court.

The language of the Legislature is plain. Look within the body of the indictment for the precise time in which the offence is alleged to have been committed. Inspect the indorsement for the clerk's minute of the time of the exhibition of the indictment in Court. Compare the several dates. If they differ more than six years in case of larceny, then the indictment is insufficient.

State Attorney. For the government we contend, that the day, month and year is sufficiently set forth in the indictment. The second day of *March, Anno Domini* one thousand eight, must be considered to intend the second day of *March* one thousand eight *hundred.*

The expression in the indictment carries this idea so naturally and forcibly to the comprehension of all unprejudiced minds, that it is observable, that during the whole course of the trial, this supposed defect was not noticed. The Petit Jury considered it to mean the year eighteen hundred when the indictment was read to them in their charge. The prisoner himself so understood it when the indictment was read to him on his arraignment, and it was left to the critical acumen of the learned and ingenious counsel to discover and apply a meaning to it pregnant with absurdity.

In the construction of indictments as well as statutes, they are to be so construed as to render them

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consistent, if it can be done without violence to the wording of them. If the indictment was originally defective in this part, we submit to the Court if it is not one of those minor defects cured by the verdict.

But we shall contend that it is not defective. An indictment which sets forth the crime to have been committed at a time before or after the precise day of the actual commission of the offence, is sufficient. *Com. Dig.* vol. 4. p. 393.

All the authorities say the time is immaterial, and that the true question is, is the allegation sufficient?

If the time set forth does not express the year 1800, yet it expresses *a time past*, and not a time future, which we concede would be an impossible time.

It is said the time set forth in the indictment is that from which the limitation is to be computed, put in opposition with the clerk's minute of the exhibition of it in Court.

We consider the date of the clerk's minute to be one point of computation; the other is not the allegation of the time of the commission of the offence set forth in the indictment, but the actual time shewn in evidence. The whole current of the practice of the Court has been to decide on testimony offered in criminal trials on the point whether within or beyond the statute of limitations in the nature of demurrer to such evidence.

Reverse this practice. Suppose a person charged with the crime of theft, and the indictment should set forth the offence to have been committed *infra sex annos*, and the Court held the respondent to the day alleged, and it should appear by plenary proof

that the offence was actually committed twenty years before the time allegated in the indictment, must the defendant be estopped from sheltering himself by the statute of limitations?

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Marsh. Mr. Attorney seems himself to doubt whether *one thousand eight* can be understood to intend *eighteen hundred.* He therefore submits to the consideration of the Court, whether this defect is not cured by the verdict.

We believe that the doctrine does not apply to criminal process. In the systematical writers, under the head of what defects may be cured by verdict, all the cases are of a civil nature.

But it is objected, that if the time alleged in the indictment is relied upon to compute the term of the statute limitation, a person might in a supposed case be excluded from the privilege of it, though the time of the actual commission of the offence would have brought him within the statute of limitations; but because the person charged may avail himself of the time set forth in the indictment to ground his bar in limitation upon, *non constat* that when the actual time of the commission of the offence is shewn in evidence, he may not avail himself of the privilege secured to him by the statute of limitations by parol demurrer to such evidence on trial.

The truth is, the prisoner has a right to many indulgences, and that in favour of innocence; for the law views every man innocent until final judgment be passed against him; and a well ordered government never delights in conviction.

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The Chief Judge delivered the opinion of the Court.

The Court consider the indictment so radically defective, that no judgment of conviction can be rendered upon it.

Every sufficient indictment must set forth the day, month and year, and in cases of burglary *the hour* when the offence was committed; and though another day may be shewn in evidence on trial, yet it must be a day within the term prescribed by the statute of limitations, and the day set forth in the indictment must be also some day within the statute time, or the indictment will be insufficient.

Judgment arrested, and the prisoner discharged.

W. C. Harrington, State Attorney.
Amos Marsh, for defendant.

WILLIAM COIT, JOHN POMROY, and JOSHUA CHAMBERLAIN,

against

SAMUEL B. SHELDON.

After an appearance and imparlance, all defects in personal service are waived.

ERROR. This writ was brought to reverse a judgment recovered by the defendant in error against the now plaintiffs, by the consideration of *Chittenden* County Court, *February* term, A. D. 1801, on default, upon an action of debt on a bail-bond, jointly

and severally made and executed by the plaintiffs in error to the sheriff of *Chittenden* County, for the admitting *William Coit* to the liberties of the prison yard. Bond assigned by *James Sawyer*, sheriff, to the present defendant, in the words following, to wit:

Know all men by these presents, that I, *James Sawyer*, the sheriff within named, do hereby assign and set over the within bond or obligation to *Samuel B. Sheldon*, the plaintiff herein mentioned, pursuant to the law in that case made and provided.

In witness whereof I have hereunto set my hand and seal this 21st day of *May*, *Anno Domini* 1800.

James Sawyer.

Signed, sealed and delivered
in presence of
Jos. Smith.

The original writ dated 15th *July*, 1800; the officer's return on the same.

Richmond, *August* 28th, 1800. Then served this writ by attaching the body of *Joshua Chamberlain*, and took the underwritten bail for his appearance at Court.

James Sawyer, Sheriff.

And also took *Job Boynton* for bail for the other two defendants' appearances.

James Sawyer, Sheriff.

Bail,

Sylvanus Church,
Job Boynton.

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General issue pleaded, and record exhibited in *oyer*.

Besides the general assignment of errors, and the common exception that the judgment ought to have been rendered in the reverse, the plaintiffs in error assigned the following:

First. There is error in this, for that the said assignment, by said *James Sawyer*, sheriff, of the bail-bond mentioned in said *Sheldon's* writ and declaration mentioned, ought by law to have been made and executed under the hand and seal of the said sheriff, and the same is so described in said *Sheldon's* writ and declaration; whereas in truth and in fact the said sheriff did not affix any seal to said assignment, as appears by the exemplification of the said assignment on the records of the County Court spread here, exhibited in Court.

Secondly. There is error in this, that it does not appear, by the sheriff's return on said writ and process of the said *Sheldon* against them the said *William Coit*, *John Pomroy*, and *Joshua Chamberlain*, that any service or notice of the same writ or process was made or given to the said *William Coit* and *John Pomroy*, as the law in such cases requires.

After some conversation rather desultory upon the necessity of affixing a seal, which it was contended by the defendant's counsel was not necessary in a statute assignment, because such assignment is operative, not from the act of a private individual, which ought to be accompanied with certain solemnities indicative of his deliberate consent, but by force of the law operating through the ministry of its known

officer; and after a recurrence to the 11th section of the "act relating to gaols and gaolers, and for the relief of persons imprisoned therein," the first exception in error was abandoned:

On the second exception, the counsel for the plaintiffs contended, that it was apparent by the officer's return on the original writ, that no notice of the suit had been given to two of the then defendants. The return simply states, that the sheriff had taken *Job Boynton* for bail for the appearances of the other two defendants.

Sed per Curiam. The Court have inspected the record. We find that the suit on the bail-bond brought by *Samuel B. Sheldon* as assignee of the sheriff against the present plaintiffs in error, was entered at the *September* term of *Chittenden* County Court, 1800, when all the defendants, now plaintiffs in error, appeared by their attorney *Elnathan Keyes*, an enrolled attorney of the Court. The cause was continued under a rule entered by agreement of parties, that judgment should be entered by default at the *February* term, 1801.

After an appearance and imparlance, all defects in personal service are waived.

Plaintiff's counsel. With submission, we conceive, that the appearance of Mr. *Keyes*, who was merely the attorney of *Chamberlain*, ought not to operate against the other defendants, who had no notice of the suit.

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Per Curiam. The record is express. Mr. *Keyes* appeared as the attorney of all the then defendants, and entered into a rule for an imparlance; and it is probable that the defendants' waiver of their plea in abatement for want of sufficient service, was the *quid pro quo* for the consent of *Sheldon* to the continuance.

When the name of an attorney appears on the record, the Court will not suffer the record to be controverted. If a party has been injured by the appearance of counsel not retained, he may have his remedy.

But be this as it may, the record must not be controverted. The plaintiffs in error, it appears by it, have had their day in Court in the original suit.

If the fact be, that Mr. *Keyes* appeared for them without being engaged, which is not readily presumable in an officer of this Court, especially a gentleman of Mr. *Keyes'* character, *Pomroy* and *Coit* have their action for the injury, and they must resort to it. They cannot have relief in the present suit. The defendant in error must not suffer by their laches, or the misconduct of their attorney of record.

Let judgment be entered, that the Court have inspected the record, and find that there is no error therein; that the judgment of the County Court is affirmed, and that the defendant in error have his costs.

W. C. Harrington and *John Fay*, for plaintiffs.
—— ——, for defendant.

DOE, *ex dem.* SAMUEL MIX,
against
JOEL WHITLOCK, Tenant.

EJECTMENT to recover possession of sixty-four acres of land in the township and island of *South Hero* in Lake *Champlain*, being Lot No. 75.

Common rule entered, and general issue to the Jury.

To render valid a sale of land under the act for raising 30,000 dollars, passed *November* 3d, 1791, an attested copy of the rate-bill or general list made by the selectmen and delivered to the constable of any incorporated town, must be shewn to have been deposited with the Treasurer of the State, by the 1st *November*, 1793.

Plaintiff read the charter of *South Hero*, signed by the Governor of the State, dated 27th *October*, 1779, in which *James Hopkins* appears to be an original grantee, and then stated that the land demanded was severed to the right of *Hopkins*, and that his title accrued by the sale of the land at public vendue for the non-payment of a tax under the act "for the purpose of raising thirty thousand dollars," passed *November* 3, 1791.

He then read the warrant of the State Treasurer, directing the first constable of *South Hero* to collect one halfpenny on each acre of land in said town, dated 2d *October*, 1792.

He then exhibited a paper purporting to be the assessment of the tax by the selectmen on the lands in the town, dated 1st *February*, 1793.

Defendant's counsel objected to this paper being read to the Jury, and took two exceptions:

First. That the assessment does not appear to have been returned to the Treasurer of the State.

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Secondly. That the assessment is not made agreeably to the statute, in that the lots, ranges, &c. are not particularly specified; but the lands are described generally, as being holden by the original proprietors.

Per Curiam. The paper cannot be admitted in evidence. When a title to real estate is defeated by operation of law, the statute must be strictly pursued.

The object of the act in directing that the return of the assessment by the selectmen should be made to the Treasurer, is important and obvious. It is to give notice to non-resident owners of the precise amount of the demand which is made upon their lands for the purposes of government, in order that they might not be divested of their lands through mistake or ignorance. Perhaps no government has been more careful in this respect than that of *Vermont*. The whole tenor of this act exhibits a marked attention to rights of the land owners.

It levies a tax of one halfpenny per acre on all the lands in the State for a great and beneficial purpose, no less than to raise the sum to be paid to the State of *New-York*, agreed upon by the several State commissioners for the final adjustment of certain controversies which had unhappily arisen between this and that highly respectable State. The act passed *November* 3d, 1791, but the tax was to be collected and paid into the treasury by the 1st day of *January*, 1794. The State Treasurer is directed between the 1st of *October* and the 1st of *November*, 1792, to issue his warrant to the first constable of each or-

ganized town in the State to collect the tax in their towns respectively. Upon the receipt of the warrant the constable is to give notice to the selectmen of the town, who, before the 1st of *March*, 1793, are to make out and deliver to the constable a rate-bill containing a list of all the lands in such town held in severalty, and the number of acres contained in each lot, and the range in which it lies, or the division to which it was drawn or pitched, and the tax to be paid on the same; and if there be undivided land in such town, the selectmen shall, under their oath of office, make an estimate of the quantity of the land so undivided, to the best of their judgment, which, together with the other lands in said town, they shall form into one general list, *and return an attested copy thereof*, on or before the 1st of *November*, 1793, to the Treasurer of the State; and if the tax should not be paid by the 1st *September*, 1793, the collector was to proceed to advertise in all the public newspapers in the State, six weeks successively, the sum assessed to each person, the place where the same would be received, and, in case of delinquency, the place where and the time when the same would be sold; and in twenty days after such publication, the collector on non-payment might proceed to vend the land.

The return was to be made to the Treasurer's office, not merely as a direction to that officer in his duty, but the Treasurer's office was to serve as a public place of deposit for the assessments. That before the publication in the newspapers, the selectmen's return of the assessment might be resorted to by the land owners to learn the amount of their several taxes; and it might at all times serve as a check

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upon the collector, that he might not collect a larger sum than legally assessed.

The Court consider the paper offered in evidence to be defective in substance also. The general terms in which the assessment is made out, does not answer the beneficial requirements of the act, which are to enable every land owner to know the precise sum he has to render to the government, and to enable him to correct the collector in any departure from official duty.

This general list must ascertain all the lands in such town held in severalty, and the number of acres contained in each lot, and the range in which it lies, and the division to which it was drawn or pitched, and the tax to be paid on the same.

It is therefore the opinion of the Court, that the paper adduced by the plaintiff cannot be read to the Jury.

Tyler, Judge, *hesitante* as to the first exception.

Plaintiff nonsuited.

Elnathan Keyes, for plaintiff.
W. C. Harrington, for defendant.

NICHOLAS AUSTIN *against* PETER DILLS.

COVENANT broken.

Declaration for that the said *Dills*, at *Burlington*, by a certain obligation or covenant under his hand and seal, dated 12th *November*, 1794, said covenant reciting, that the plaintiff had at great expense pro-

Where the deed is not merely the inducement but the foundation of the action, or where the right of action is not created by operation of law, but by the act of the party, the plaintiff must make profert in his declaration of the obligation or other instrument embracing a contract.

cured a warrant of survey of a township of land in the Province of *Lower Canada*, called *Bolton*, for himself and associates, and that he had advanced large sums of money in locating said township. That the Governor of *Lower Canada* had determined to grant said land to the plaintiff and his associates, to be holden in common, making 1,200 acres to each associate. That the plaintiff had a right to appoint his associates, and did name said *Dills* to be one of them, for the express purpose of reconveying part of the same to the plaintiff for his trouble and expense in the business: and he the said *Dills*, in consideration thereof, did by said covenant bind and oblige himself, that on having his name inserted in the patent that he would immediately make and execute, agreeably to the laws of the Province of *Lower Canada*, a deed conveying in fee all his right to the lands in said *Bolton*, which he had acquired by having his name inserted in the patent or charter, excepting to two hundred acres, which said *Dills*, in consideration of the premises, was to reside upon, or procure some person with a family to reside upon seven years; and that he or such person and family should enter upon said two hundred acres, so to reside, in one year from said 12th day of *November*, and should clear and cultivate twenty acres of the same within two years from the date of said charter or patent, or that the said *Dills* would convey the said two hundred acres to the plaintiff, or to some person who should effectually cultivate the same. And the plaintiff avers, that in pursuance of the covenant he procured the said charter or patent, by virtue of which said *Dills* was entitled to 1,200 acres of land

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in said *Bolton;* but though often requested he refuses to convey to the plaintiff the said one thousand acres, nor within one year from the said 12th day of *November*, did he reside on the same 200 acres, or procure any person with a family so to do; nor within two years from the date of said patent or charter, did he cultivate said twenty acres, nor reconvey the same to the plaintiff, or to any other person who would effectually cultivate the same; *ad damnum*, 2,000 dollars.

To this declaration defendant demurred, and for *special* cause of demurrer set forth,

That the plaintiff hath not in his declaration made profert of the obligation or covenant counted upon.

Joinder in demurrer.

Counsel for the defendant. The plaintiff has declared upon a covenant entered into by the defendant, and assigned particular breaches. The law requires that he should have the deed or obligation in Court, *and offer to shew it*, that the defendant may demand it in *oyer*, and avail himself of it in his defence.

Counsel for plaintiff. We have recited the whole obligation substantially in the declaration, and the defendant can have every advantage from the declaration itself that he could have derived from an inspection of the deed. The reason of the *monstrans de fait* is done away.

Sed per Curiam. The principle of law is, that where the deed is not merely the inducement but

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the foundation of the action, or where the right of action is not created by operation of law, but by the act of the party, the obligation or any other instrument embracing a contract, must be proferted in the declaration. It is not sufficient for the plaintiff to say, I have set it forth substantially, or even *verbatim et literatim* in the declaration, but he must give notice that he has it ready to be shewn,

First, for the inspection of the Court, that they may see whether it is duly executed, and without rasure or interlineation.

Secondly, for the benefit of the adverse party, that he may know whether it be his seal and signature; whether there be any indorsements or addenda, or references to other instruments, which may vary the covenants, or shew that they have been in part or wholly fulfilled; and particularly that he may compare it with the declaration, and incorporate a correct transcript of it with the record, that the judgment rendered upon it may be pleaded in bar to any future action.

Declaration insufficient.

After judgment on special demurrer, the Court will on motion order a declaration amended on payment of costs.

And now the plaintiff moved for a rule upon defendant to shew cause why he should not have leave of Court to amend his declaration.

Rule granted.

Counsel for defendant. The statute of jeofails expressly excepts those defects in the declaration which the party demurring shall especially set down in demurrer. We conceive it is beyond the power of the Court to order amendments in such case.

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Sed per Curiam. The Court will never turn a party over to a new action while the present suit can be sustained without injury to the adverse party.

The Court consider the powers given to them by the 51st section of the act defining their powers, and regulating judicial proceedings, to be very clearly expressed.

Vermont Stat. vol. 1. p. 74.

The act declares,

First. That no summons, writ, declaration, return, process, judgment, or other proceeding in civil causes, in any of the Courts in this State, shall be abated, arrested, quashed, or reversed, for any defect or want of form: *but the said Courts respectively shall proceed and give judgment according to the right of the case and matters in law, as shall appear unto them, without regarding any imperfections, defects, or want of form* in such writ, declaration, or other pleading, return, process, judgment, or cause of proceeding whatsoever; except those only in case of demurrer, which the party demurring shall specially set down and express, together with his demurrer as the cause thereof.

Thus far there is no amendment contemplated by the act. But the Court, with a fixed eye to law and justice, are to disregard all technical defects, excepting those to which their attention is particularly drawn by special demurrer. Such they are obliged to notice, and to decide whether they render the declaration, &c. insufficient or not. If the Court decide in favour of the demurrant, the statute, pursuing the liberal intent declared in the outset, that no summons, writ, declaration, &c. shall be abated, arrested, quashed or reversed for want of form, provides,

"that the said Court respectively shall and may, by virtue of this act, from time to time amend all and every such imperfections, defects, and want of form, other than those only which the party demurring shall express as aforesaid."

Here is ample power given to the Court to order amendments from time to time, excepting those set down in demurrer.

But the statute proceeds—And the Court "may *at any time* permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said Courts respectively shall in their discretion by their rules prescribe."

Amendments may be therefore made in all possible cases, and the only correct distinction which can be taken between amendments before and subsequent to special demurrer, that the former may be made either by the peremptory direction of the Court, or application of the party, *without costs*, and the latter shall be suffered upon such conditions as the Court shall in their discretion by their rules prescribe.

Therefore, in the present case, the plaintiff has leave to amend.

Let the rule be made absolute, with conditions that the plaintiff render to the defendant his costs from the commencement of the suit to this time, and that he tax no costs against the defendant prior to the next term of the Court, to which the cause is by order of Court continued.

Rule made absolute.

Daniel Chipman and *Samuel Miller*, for plaintiff.
W. C. Harrington, for defendant.

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ADIEL SHERWOOD *against* STEPHEN PEARL.

In case against the sheriff for taking insufficient bail on mesne process, a *non est* returned by the sheriff's deputy on the execution which issued upon the *fi. fa.* against the bail, may be so far impeached as that the sheriff may shew in his defence under the general issue, that the bail was of sufficient property to respond the judgment against the principal at the day of the date of such execution.

SPECIAL action on the case for taking insufficient bail.

Plaintiff declares, that defendant was sheriff of *Chittenden* County, during the years 1793, 1794, 1795 and 1796. That he purchased out a writ of attachment returnable to *Chittenden* County Court, dated 23d *July*, 1793, against *John Ledgerd*, which he delivered to *Enos Wood*, then deputy to the defendant, to serve and return according to law, who on the 30th of the same *July*, arrested the body of *Ledgerd*, and accepted one *Robert Works* as his bail. That at the *February* term of the County Court, 1795, he recovered judgment against *Ledgerd* for 107 dols. 33 cts. and costs, and took out his writ of execution and delivered the same to *Enos Wood*, then also deputy to the defendant, who returned it *non est*. That on the 10th of *August*, 1795, he purchased out his writ of *scire facias* against the bail, *Robert Works*, signed by *John Law*, Esquire, one of the Justices of the Peace within and for the County of *Chittenden*, and returnable to *Chittenden* County Court, *September* term, 1795. That he recovered judgment against *Robert Works*, *February* term, 1796, for 144 dols. 57 cts. damages, and 26 dols. 75 cts. costs. That he took out his writ of execution 10th of *August*, 1796, and delivered it to —— ——, another deputy to the defendant, who within 60 days returned it *non est*. That the judgment is in no part satisfied. And so he says, &c.

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Plea, general issue, and put to the Jury.

There are two points made in the defence:

First. That the writ of *scire facias* was signed by a Justice of the Peace, when it ought to have been signed by one of the Judges, or the Clerk of the County Court.

Secondly. That *Robert Works* was sufficient as bail at the time he indorsed the original writ, and continued so to be for several years afterwards.

The first point was by agreement of the parties reserved for the opinion of the Court.

The cause proceeded to the Jury upon the second.

To the evidence adduced in support of this the counsel for the plaintiff objected.

Daniel Chipman. The act concerning sureties and *scire facias*, passed *March* 3d, 1787, must govern in this case; by the 4th section of which it is enacted, "that when any officer or other person serving an attachment or authority, issuing a replevin, shall take insufficient bail or sureties in the action, he shall be liable to answer all damages to the creditor or creditors, his or their executors, administrators or assigns, who may recover the same against the person taking such insufficient bail or sureties, his heirs, executors or administrators, in a special action on the case to be brought for that purpose."

Haswell's edit. of the Statutes, p. 171.

We consider that the words of the statute are but the expressions of the common law; that no time being mentioned in the statute when the bail shall be sufficient, it must be intended, in order to carry the beneficial design of the statute into effect, that the

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bail shall be sufficient at the time of the issuing the writ of execution upon the *scire facias*.

We contend further, that no shewing of the sufficiency of the bail can be made at *any time* after the issuing of the execution on the *sci. fa.*

Amos Marsh, for the defendant. The common law, as held in *England*, certainly will not apply here, owing to our different modes of practice. In *England* with great propriety the sheriff is holden at all events responsible for bail taken by him on mesne process whilst the responsibility lies on him, which is but for a brief period; for when the Court to which the writ is returnable is opened on the first day of the term, the defendant must appear and enter special bail, or be defaulted, and thus relieve the sheriff from his responsibility, or give him an immediate opportunity to secure himself; but by our practice no special bail in such case is entered in Court; and if the Court should consider the sheriff responsible for the sufficiency of the bail until the issuing of the execution on the *sci. fa.* the sheriff would in all cases be at the mercy of the party. He might take sufficient bail for an insolvent debtor upon a suit instituted for the recovery of a large demand, the bail might continue sufficient for years, but not until the termination of the suit, which, by connivance between the parties, may be protracted with the design of lurching the sheriff.

The silence of the statute respecting the time when the bail shall be found sufficient, plainly shews that the Legislature meant to leave it subject to the sound discretion of the Court.

If it is in the discretion of the Court, surely there never was a case which called more forcibly for their interposition than the present.

Our client has long and faithfully served the State in the arduous office of sheriff. His deputy nearly ten years since accepted a man as bail, who was then acknowledged to be a man of handsome property, sufficient to respond many such judgments as the present plaintiff has recovered. He continued amply responsible for years, but has at length removed from the *United States*. During this time the suit has been unreasonably protracted; and now, when our client had retired from office, a suit is instituted against him for the supposed default of his deputy, whose bonds to our client as sheriff have probably ere this been cancelled. What could our client have done as a faithful officer for the benefit of the plaintiff that he has not done? He accepted by his deputy, *Enos Wood*, bail amply sufficient. Could he have enforced and accelerated a judgment on the original suit? or was it expected that he should assume the regal prerogative, and have issued his writ of *ne exeat regnum* against the bail.

Per Curiam. The *non est* returned upon the writ of execution issued upon the judgment rendered in the action of *scire facias*, may be so far impeached, that the defendant may shew in evidence, that *Robert Works*, the bail, was of sufficient property to respond the judgment on the 10th of *August*, 1796, when the writ of execution on the *sci. fa.* is dated and was issued.

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The defendant failing to shew this, a verdict was taken for the plaintiff by consent, subject to the opinion of the Court on the point reserved.

Verdict for plaintiff, 210 dols. 25 cts.

Samuel Miller and *Daniel Chipman*, for the plaintiff.

Amos Marsh and *W. C. Harrington*, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

CHITTENDEN COUNTY, JUNE ADJOURNED TERM, A. D. 1802.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

ADIEL SHERWOOD *against* STEPHEN PEARL.

Reserved case.

A writ of *scire facias*, returnable to the County Court, must be signed by a Judge, or the Clerk of the Court, and not by a Justice of the Peace.

THE plaintiff declared against the defendant as late sheriff of *Chittenden* County, for the laches of *Enos Wood*, his deputy, in accepting *Robert Works* as bail, on mesne process, in a certain action commenced and prosecuted to final judgment and execution by the plaintiff against one *John Ledgerd*, he the said *Robert* being insufficient as bail. The cause being put to the Jury upon the general issue, the plain-

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tiff offered in evidence a writ of *scire facias* brought by him against the said *Robert Works* as bail to the said *John Ledgerd*, which writ was signed by *John Law*, Esquire, one of the Justices of the Peace within and for the County of *Chittenden*, and made returnable to *Chittenden* County Court, *September* term, 1795.

In an action on the case against the sheriff for taking insufficient bail upon mesne process, the defendant is by the plaintiff made so far privy to the judgment against the bail, that he may in his defence take advantage of a radical defect in the process upon the *sci. fa.*

The counsel for the defendant objected to the writ of *scire facias* being read and heard in evidence by the Jury, because they say that such writ was illegally issued, and ought to have been signed by one of the Judges of the County Court, or by their Clerk.

It is hereby ordered by the Court, with the consent of parties, on the record entered, that the cause shall proceed to the Jury, and a verdict be taken on the general issue, subject to the opinion of the Court on the admission of the above writ of *scire facias* in evidence. That is to say, if the Court shall be of opinion,

First. That the above writ of *scire facias* was illegally issued; and,

Secondly. If illegally issued, that such error in the process can be taken advantage of by the defendant in this present action, then judgment shall be entered for the defendant with legal costs of suit.

But if the Court are of opinion otherwise, then judgment shall be entered for the plaintiff, to recover such sum in damages as the Jury may find by their verdict with legal costs.

Verdict for plaintiff, 210 dols. 25 cts.

By order of Court,

Solomon Miller, Clerk.

The reserved case was argued and decided this term.

Sherwood v. Pearl.

Amos Marsh. We consider that the plaintiff's action against the defendant, late sheriff of this County, is a demand of strict right. No equitable consideration can be shewn for it. To enforce such a demand in a Court of Justice, the statute must be strictly pursued.

The plaintiff complains, that the defendant hath not performed his duty required by the statute, and therefore he says he is entitled to a special action on the case upon the statute. It is therefore incumbent on him to shew himself within the purview of the statute, and that he also hath pursued the path of duty prescribed by the statute in coming at this right.

We say he hath failed in this,

Because his writ of *scire facias*, offered by him in evidence on trial to the Jury, was not legally issued, and therefore the proceedings upon it are erroneous as they relate to the bail, and void as they relate to the present defendant.

That the writ of *scire facias* was illegally issued, being signed by a Justice of the Peace, is clear from a recurrence to the act passed *March* 10th, 1787, regulating processes and proceedings in civil causes, which was then in force, and which, by a saving clause, made when repealed, is to be in full force as to all matters and things done or transacted during its existence, to which it relates, and is not to be construed to affect any rights or remedies accruing under it.

Haswell's edit. *Vermont* Stat. p. 23.

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This statute adopts the common law distinction between *original* and *judicial* process. The writ in the former shall be signed by a Judge or Clerk of the County Court before which the cause is to be tried, *or by a Justice of the Peace of the same County;* but judicial writs, of the nature of which is that of *scire facias*, must be signed by a Judge, or by the Clerk of the Court: therefore the statute, speaking of those writs which may be signed by a Justice of the Peace, terms them "processes to be commenced," that is, to be *originally* commenced. But the writ of *scire facias* is not, technically speaking, a process to be commenced, but a writ directed to a party to shew cause why a writ of execution should not issue against him upon a judgment already rendered, and a process which hath been commenced. That the statute holds forth this distinction in process before the County Court, is confirmed from the next sentence, "And all writs signed by a Judge or Clerk of the County Court aforesaid, as well original as judicial."

But it will be contended, that if this writ of *scire facias* was illegally issued, the present defendant cannot in this action take advantage of such defect in the process.

We consider that he has such right. Here is a void, or at the least a voidable process, and the execution issued upon it has been adduced in evidence to shew the insufficiency of the bail, which was the main point in issue to the Jury. The defendant in *sci. fa. Robert Works*, absconded the *United States*, and the judgment against him was rendered by default. The present defendant has had no day in

Court to shew that process is void. When he is now made privy to the record, shall he not be let in that the mesne process is void, and the judgment, execution, and return of *non est* consequently void, and therefore the legal right to sustain this action does not exist in the plaintiff.

Daniel Chipman. Here are two points in the case reserved to be considered by the Court:

First. Whether the writ of *sci. fa.* was legally or illegally issued.

In reply to the construction given to the statute of *March*, 1787, by the opposing counsel, we shall read that statute.

"Be it enacted, &c. that the ordinary mode of process in civil causes, in the several Courts of Judicature within this State, shall be by summons or attachment, and according to the form provided by law; and *every process* to be commenced before any County Court within this State, shall be signed by a Judge or Clerk of the County Court before which the cause is to be tried, or by a Justice of the Peace of the same County, and all writs and processes triable in the Supreme Court, and therein originally commenced, shall be signed by a Judge of the same; and all writs signed by a Judge or Clerk of the County Court as aforesaid, as well original as judicial, shall run into any County or place within this State, and be there executed by any officers to whom directed."

It appears here, that the common law distinction between original and judicial process, does not apply to the process of the County Courts, but is expressly

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applied to the process of the Supreme Court. But if the Court can possibly give the construction contended for by our opponents, we rest securely on the second point in the case reserved,

That if the writ of *sci. fa.* was illegally issued, the defendant cannot take advantage of it in the present action.

The judgment in *sci. fa.* must be acknowledged to be in force. *Robert Works*, aside of the statute of limitations, could not reverse it by writ of error; for the signing by the magistrate, if illegal, was a matter in abatement; and a man shall never assign that for error which he might have pleaded in abatement; for it shall be accounted his folly to neglect the time of taking that exception. *Bac. Abr.* vol. 2. p. 492.

But if *Robert Works* could have taken advantage of it in error, no advantage can be taken by a *third person;* for if so, the present defendant might have had his writ of error. But the law says, " no person can bring a writ of error to reverse a judgment who was not party or privy to the record." *Roll. Abr.* 747. 1 *Wils.* 255. And until this judgment is reversed, no one is permitted to say it is not in force in the face of the record; for it is laid down in *Bacon's Abridgment*, vol. 2. p. 529. " If an action of escape be brought against the sheriff, and the judgment upon which it is founded be reversed before such time as the defendant is forced to plead, he may plead *nul tiel record;*" but it is said in the note, " If in debt upon escape the plaintiff recovers and hath execution, and *after* the first judgment is reversed, yet the judgment for the escape remains in force."

Every thing necessary for the plaintiff to shew to maintain this action is, that the defendant took insufficient bail, and the *non est* on the execution in *sci. fa.* is sufficient evidence of it. What could he shew more? The plaintiff has lost his debt by the laches of the defendant in failing to take sufficient bail. The law says, in such case the sheriff shall be responsible; and now the defendant says, the writ of *scire facias* illegally issued. If so, this is a discovery not made by *Robert Works*, the person solely in interest, but by himself, or rather through the penetration of his counsel. If the defendant had done his duty, and accepted sufficient bail, the original judgment would long ere this have been satisfied, and we never should have heard of this supposed defect in the process.

W. C. Harrington. We shall submit the first point to the consideration of the Court without further remark.

Upon the second, it is insisted by our opponents, that *Robert Works* himself could not have taken advantage of this defect in the process; for it is cited from *Bacon's Abridgment*, that a party shall never assign that for error which he might have pleaded in abatement; for it shall be accounted his folly in neglecting to take the exception in time. We do not dispute this general position, but its applicability to this case. This law writer is here speaking of cases where the defendant has appeared and pleaded in Court; and all the explanatory cases cited shew instances where the defendant appeared and pleaded, and his appearance and pleading are the reasons rendered why

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he may not take advantage of such defects in error; for he has waived his right, which he may do either by pleading or imparlance, but never by *default*. Error brought on a judgment rendered on default will notice every defect in process, pleading, and judgment.

But it is said, that even admitting *Works* could have reversed the judgment in *sci. fa.* by error, the present defendant could not.

We consider this position not well founded. The general principle was not fully stated by Mr. *Chipman*. "No person can bring a writ of error to reverse a judgment, who was not a party or privy to the record." This is correct: but there is a further clause; "or who was not injured by the judgment, and therefore is to receive advantage by the reversal thereof."

Under this rule we find frequent cases of persons bringing error, who were not privy to the record. The heir at law, the remainderman, or any other person prejudiced by the erroneous judgment, may bring error. But if we were not privy to the judgment, and could not bring error, the reason why we should *now* take advantage of this void process, applies with greater force. If as we assert, the plaintiff could at no stage of the process have interfered to take advantage of this defect in the issuing of the *sci. fa.* and if, as our opponents insist, neither *Works* or our client could set it aside by error, and our client cannot now take advantage of it in the present action, surely here is an injury sustained, without possibility of remedy; which is a solecism in law.

It is said the plaintiff, through the laches of our client, has lost his debt, unless he can recover it in

the present action. This is intimated to be a hard case; but certainly it would be equally hard for our client to respond a debt from his own purse, through the laches of a deputy long since discharged from his bail.

We have no doubt that the Court will in this case pursue that even tenor of justice which has so long been dispensed; that they will decide this case upon the great leading principle, that he who pursues a statute, not a moral right, shall himself pursue the statute strictly.

The Chief Judge delivered the opinion of the Court, *Tyler*, Judge, dissenting.

The Court consider the intention of the statute of *March* 10th, 1787, which must govern in this case, to be, that the writ of *scire facias* must be signed by one of the Judges, or the Clerk of the County Court, and therefore the present being signed by a Justice of the Peace, issued illegally.

The distinction between original process, which may be signed by a Judge or Clerk of the County Court, or any Justice of the Peace within the County; and the judicial writ, which must be signed by the former, is of importance.

The judicial writ, being grounded upon the records of the Court, should be issued only by those who have official access to, or are keepers of the records. These writs are sometimes issued of right, and sometimes by discretion. In the former case the Clerk may sign, in the latter a Judge only. But the original writ may be signed by any magistrate in the County, because in him the signing is a mere minis-

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terial act, requiring neither the exercise of discretion, or intimacy with the records.

The question whether *Robert Works* or the present defendant could have taken advantage of this defect in error, seems to be aside of the present issue, which is, whether the defendant can avail himself of it in the present action.

The Court consider, that the defendant, by the plaintiff's having produced the records and proceedings on the judgment in *scire facias* against him in evidence upon the issue to the Jury, is by the act of the plaintiff so far made privy to the record, that he may take advantage of the illegality of the issuing the writ of *scire facias*. A party takes a judgment upon a defective process at his peril, if it be such a defect as is waived by imparlance or pleading, the adverse party shall not maintain error against him; but whenever he attempts to use the record against a third person, especially a public officer, he may at such time take advantge of the defect.

The plaintiff's claim, as has been well observed, is a demand of strict statute right; and, to shew himself entitled to it, he must convince the Court or Jury, that he has strictly pursued it in all substantial parts of his proceedings.

Let judgment be entered, that the verdict of the Jury be set aside, and that defendant have his costs.

Daniel Chipman and *Samuel Miller*, for plaintiff.

Amos Marsh, *W. C. Harrington*, and *Levi House*, for defendant.

TREASURER of the STATE

against

EZRA MOORE, SOLOMON STANTON, and CHARLES AMES.

Writ of *scire facias* may be signed by the Clerk of the Court, and may issue as an attachment.

SCIRE FACIAS, to shew cause why a writ of execution should not issue against them for the penal sum of a bond of recognisance entered into by them for the personal appearance of *Ezra Moore*, at the Supreme Court at their term holden in this County, on the first *Tuesday* of *January*, 1800, to answer to an indictment presented against him by the Grand Jury. The writ signed by *Solomon Miller*, Clerk of the Court, served as therein directed by attachment, and returned to the *January* term, 1802.

The defendants demurred, and set down for causes specially,

First. That the writ of *scire facias* issued as an attachment, when by law it should have issued as a summons.

Secondly. That it was signed by the Clerk, when it should have been signed by one of the Judges of the Court.

By the Court. This is a dilatory plea. Should it not have been pleaded in abatement?

Samuel Miller. I am sensible these defects in the process might have been pleaded in abatement; but I was not engaged until the present term. A

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doubt had arisen whether the time for pleading a dilatory plea had not passed; and though I am inclined to think that the Court would consider the present sitting to be as of the stated term, yet as we consider these defects may be well taken advantage of in demurrer, we have preferred this mode.

Court. Granting that the adjourned is but a prolongation of the stated term, yet as the term to plead in abatement is restrained by the rule to the second day of the term, have you not waived your abatement? However, let the cause proceed. The Court will not permit Mr. Attorney to demur to a demurrer. But let it be well understood, that if the Court decide against the demurrer, they will not, in this case, award a *respondeas ouster*, but will render a judgment in chief.

Miller. The 27th section of the judiciary act enacts, "that all writs of error, writs of *scire facias*, writs of review, and other writs, the service of which is not particularly directed by statute, where the defendant, respondent, or party on whom the service is to be made, is an inhabitant or occasional resident in this State, shall be served in the same manner as is before provided in this act for the service of writs of summons." This refers to the preceding section, which enacts, "that all writs of summons shall be served on the defendant or defendants, by delivering him, her, or them a true and attested copy of said writ, with the officer's return thereon, or by leaving such copy at the house of his, her or their usual place

of abode, with some person of sufficient discretion resident therein."

The 31st section of the same act, it is true, enacts, "that writs of *scire facias* against bail may issue as attachments against the goods, chattels, or estate of such bail, and for want thereof against the body or bodies of *such bail*, as in original process." But the statute here manifestly refers to such writs of *scire facias* as may be issued against bail upon mesne process, and not against bail entered upon recognisance for the personal appearance of a delinquent in Court. For the 32d section explains the bail alluded to, "that when such surety or sureties shall have indorsed his, her or their names as bail as aforesaid," &c. This certainly cannot allude to bail on recognisance, where no such indorsement is made. The statute also speaks of *such bail*, expressly referring to the bail before treated upon in the statute, which is entirely silent upon the subject of bail entered into by way of recognisance. Indeed the whole subject matter of the statute, from the 24th to the 33d section, both inclusive, is civil process.

Per Curiam. The Court do not incline to hear upon the second point. The statute provides, "that every writ or process, originally returnable to the Supreme Court, shall be signed by a Judge or Clerk of the same." It is true there are certain writs issuing originally from this Court, which the Clerk is not empowered to sign; but the only distinction between those which he may or one of the Judges must sign, is, where the granting of the writ is of discretion or of right. The *scire facias* is a writ which issues mi-

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nisterially, and the plaintiff hath a right to demand it, and the Clerk may sign it. But writs of *audita querela*, error, &c. the issuing of which depends on the sound discretion of the Judge, he cannot sign.

The first exception is, that the writ should have been issued as a summons, and not as an attachment. The Court do not consider the case of bail entered upon a recognisance as a *casus omissus* in the statute, but do consider that the 31st section of the judiciary act covers all writs of *scire facias*. It is said the statute is here treating of civil process. This is correct. But the recognisance taken for the appearance of a delinquent to answer to an indictment, is a civil contract between the government, represented by the Treasurer, and the recognisors. The whole course of practice, since the promulgation of the statute, has been, where the occasion required, to issue writs of attachment against the bail on such recognisances.

Judgment, that demurrer is insufficient.

W. C. Harrington, for the State.
Samuel Miller and *John Fay*, for defendants.

MOTION for a writ of *procedendo.*

Motion for writ of *procedendo.*

Harrington, State Attorney, at this term moved the Court for a writ of *procedendo*, directed to *Chittenden* County Court, commanding the Judges to proceed, hear, try and determine a certain cause between the State and one *Ross*, who had been arrested to answer in that Court for a larceny in stealing a buffaloe skin, upon an information filed *ex officio* by the State Attorney.

The facts upon which the motion was grounded, appeared to be,

That *Ross* had been arrested and arraigned upon the information, and pleaded not guilty, and put himself on the country for trial. A Jury was impanelled; but upon the trial the Judges of the County Court, discovering the chattel alleged to be stolen to be of small value, they considered the information to have been improperly brought before their Court, but the offender ought to have been tried by a single magistrate. The County Judges, without consulting the State Attorney, peremptorily dismissed the Jury, and ordered the prisoner to go without day, who immediately fled into the *British* dominions, and hath not returned since.

In support of his motion, Mr. Attorney read part of the 8th section of the judiciary act, " That the Supreme Court of Judicature shall have power to issue

writs of *mandamus* warranted by the principles and usages of law to any Courts appointed or persons holding office."

Motion not granted.

CHARLES BAILEY *against* JOHN RUSSELL.

A promissory note, dated 6th *November*, 1787, is barred in six years, under the act of the 10th of *March*, 1787, taken in connection with the act of the 28th of *October*, 1790. *Haswell's* edit. *Vermont* Stat. p. 101.

PLAINTIFF declared upon a promissory note made by the defendant for the sum of 6*l.* 10*s.* lawful money, dated *the 6th of November*, 1787. Original writ served in 1800.

Defendant pleaded in bar the statute of limitations, passed 10th of *March*, 1787; which statute, after mentioning a variety of other actions, which, with those on promissory notes, shall be sued or brought *at any time after the end of the present sessions of Assembly*, enacts, that they shall be commenced and sued within the times herein after expressed. All actions on promissory notes, within six years *after the passing hereof, if executed before the passing of the act, or if executed after the passing of the act, within fourteen years after the cause of* action shall accrue, and not after. The plea was set forth with the usual averments.

Plaintiff demurred.

At the *October* session of the General Assembly, 1787, when a revision of the laws took place, the operation of this act, with a number of others, passed the session preceding, was suspended. The act declares, that the force and operation of the revised laws, passed by the Legislature of this State at their last session, except certain acts, be and hereby are suspended until the 1st day of *December* next, *id est*, 1787.

Haw. edit. Vermont Stat. p. 212.

And be it further enacted, that the force and operation of all the laws in this State, now in force, be continued until the same first day of *December*.

The question now made is, whether the note declared upon was made before or after the passing of the act of the 10th of *March*, 1787. In the first case the action on the note would be limited to six, in the latter to fourteen years.

The counsel for the plaintiff contended, that though the operation of the act was suspended until a day subsequent to the execution of the note, yet the statute of *March* 10th, 1787, placed the distinction between actions on promissory notes limited to a shorter or longer period upon "*the passing of the act.*"

The defendant's counsel replied, that when an act is suspended by a subsequent act, the suspension is by its nature ingrafted into and becomes part of the first act, and the former cannot be said to be passed, that is, to become law, which is the technical meaning of the word "passed," as applied to statutes, until it goes into operation on the day provided by

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Haswell's edit. *Vermont* Stat. p. 281.

the suspending act; that the Legislature so considering, had, by an additional section in the suspending act, declared, that all the existing laws of the State should be in force until that time; which laws would have been abrogated and repealed in *March*, 1787, if it had not been for this additional section.

But, to put the question for ever at rest, the Legislature, on the 28th of *October*, 1790, had passed an explanatory act, in the preamble of which they say, that whereas said act, to wit, the act for the limitation of actions, was suspended from the 10th day of *March*, 1787, not to take effect until the 1st day of *December*, 1787, and doubts have arisen from which of those dates said statute should be construed to make the time of limitation begin: therefore be it enacted, &c. that the 1st day of *December*, in the year of our Lord one thousand seven hundred and eighty seven, be, and hereby is declared to be, the day from which the time of limitation, as to the passing the aforesaid statute, shall begin, any thing contained therein to the contrary notwithstanding.

The plaintiff's counsel insisted, that this explanatory act did not touch the present question.

The expression in the act of *March* 10th, 1787, was vague "*after the end of the present session of Assembly*," a period which could not be generally known; and therefore, whether the limitation applied to six or fourteen years, it was equally proper for the Legislature to ascertain by public act the precise time of the rising of the General Assembly. But the Legislature, by their explanatory act, never intended

to run into the absurdity of declaring, that an act was not passed at the time it was actually passed.

Sed per Curiam. That the Legislature have a power to explain their own acts, cannot be denied. The explanation goes to the very point in issue. The words of the statute are, that the first day of *December*, one thousand seven hundred and eighty-seven, be and hereby is declared to be the day from which the time of limitation as to the *passing* the aforesaid statute, shall begin. Indeed this was the only subject which admitted of dispute in the construction of the statute. The time of the end of the session of Assembly, holden in *March*, 1787, had been already ascertained and recorded in the Journals of the Council and House of Representatives.

Judgment of Court. Demurrer insufficient, and that defendant have his costs.

ROBINSON, Chief Judge, dissenting.

Daniel Chipman, for plaintiff.
W. C. Harrington, for defendant.

Heacock v. Walker.

NATHANIEL HEACOCK
against
SAMUEL WALKER.

A person loaning a horse, which is eloigned and sold by the borrower, has a right to recapture him, provided it be done without breach of the peace.

THE nature of this cause, the evidence, and the opinion of the Court, may be amply collected from the charge to the Petit Jury, delivered by the Chief Judge:

Gentlemen of the Jury,

THE plaintiff demands of the defendant a sum in damages for having, as he alleges in his declaration, on the 26th day of *March*, 1799, with force and arms, at *Charlotte*, in this County, took from his possession a certain gelding horse, the plaintiff's property, of the value of 100 dollars.

To this declaration the defendant hath pleaded that he is not guilty. The issue hath been joined, and you are to find by your verdict, founded on the law and the evidence you have heard, whether he is or is not guilty.

If you find that he is guilty, you will by your verdict, assess a sum in damages commensurate with the injury the plaintiff hath sustained, which must be measured by the value of the horse at the day of the trespass of which you have had proof, with the legal interest to the present time.

The evidence in the case, as collected from the testimony of numerous witnesses, shews in substance,

That the property of the horse, in the month of *January*, 1799, was in the defendant *Walker* by *bona*

fide purchase from one *Elisha Sadd.* That soon after the defendant, who then lived in *Pittsford*, in the County of *Rutland*, loaned the horse to one *Aaron Heacock*, to go a journey into the northern part of this State. On his journey, *Aaron Heacock* purchased from the plaintiff a load of tin ware upon a short credit, and proceeded with the horse and ware towards *Pem*, in the State of *New-York*, at which place he engaged to vend the ware, and with the avails of the sales to return and pay the plaintiff. But it seems he went into the Province of *Lower Canada*, where he disposed of his merchandise. The plaintiff having waited a reasonable time, and suspecting the honesty of *Aaron Heacock*, sent his son *Ambrose* in pursuit of him, who overtook him in the village of *La Prairie*, where he sold and delivered the horse to the plaintiff, through the agency of his son, in part payment for the tin ware, who brought the horse to his father, the plaintiff, who had him in possession some weeks. On the day preceding that of the trespass alleged, the defendant came to a tavern in *Charlotte*, under pretence of purchasing a horse to ride to *Canada*. The plaintiff was sent for, and the parties had in appearance nearly completed a contract for the purchase of the horse; but the business was deferred until the next day. Early in the morning, before the plaintiff had arisen, the defendant went to his stable, and persuaded his son *Ambrose* to bring the horse into the highway. The defendant then put his own bridle and saddle upon him, mounted the horse, and, as he rode off with him, proclaimed that he took the horse as his own property.

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Upon the law arising from these facts, which the Court will deliver to you, you will find your verdict.

In order to maintain trespass for a chattel, the plaintiff must shew that the property was in him at the time of the taking; you have therefore to inquire, whose was the property of this horse on the 26th of *March*, 1799.

We learn from the witnesses, that in the month of *January* preceding, the property was incontestibly in the defendant by *bona fide* purchase.

No person in a legal view can be divested of his property except by his own contract, or the operation of law.

Here it is apparent the defendant hath not parted with his right by contract. Has he been divested of it by operation of law? Was his loaning this horse to *Aaron Heacock* putting his property in such a situation as would render a sale by the borrower operative against him? For it is true the legal owner of property may place it in such a situation as that he may be divested of it legally without his consent. As where a person acquires a right to a chattel by fair purchase, and leaves it in the possession of the vendor, a subsequent sale by the vendor will enure in favour of a second purchaser, if he is ignorant of the first transfer.

But had the defendant, by his loan to *Aaron Heacock*, thus exposed his property?

The plaintiff contends that he has; for he says he purchased this horse in open market. He has cited several cases from the *English* books to shew, that the sale of property thus purchased shall be valid against the owner.

One case cited is of property purchased in a shop in the city of *London;* but this appears to have resulted from the custom of that city, and custom only protects the sale of such property as by prescriptive right has been vended in such shop.

The other cases are of goods vended at certain fairs or statute markets; but it appears that these fairs and markets are held on stated days, that there are known officers attached to them, in whose books entries are made of the property exposed to sale. Thus from their very nature they become places where those who have lost property will naturally resort to find it; and if they neglect, there seems some shew of reason why they should not afterwards claim it from an honest purchaser.

But in this State we have no such city customs; no prescriptive rights to vend particular articles in particular places; no fairs or statute markets.

What sales shall be considered to have been made in market overt.

The only cases of sale which can with propriety be said to be made in *overt market* with us, are sales made under the probate act upon writs of execution, and of goods found, or estrays, which being regulated by statute, public advertisement made, and the sale effected by the known officers of government, or under the express provisions of the laws, ought to enure against the owner.

But it is observable, the purchase by the plaintiff was made in a foreign dominion, and the question will arise, whether a chattel, eloigned from an inhabitant by an inhabitant, and then sold to a third inhabitant of this State in a foreign dominion, shall vest the property in the purchaser. The Court consider it would not.

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The principle of law is, that he who loans property, which is eloigned by the borrower and sold to a third person, is not by the sale divested of his interest in the property.

The converse doctrine would tend to abridge that friendly intercourse among men which ameliorates society; for if the law is, that a man must consider, that every time he loans his horse to a poor neighbour to go to the mill, or to call aid to his wife in the hour of nature's difficulty, that he risks the sale of the property by the borrower, you will consider how far this will tend to restrain those acts of neighbourly kindness, which, when exercised by the opulent towards the poor, assume a portion of that charity which is the ornament of christian and social life.

A person may recapture his property in such manner as may constitute a trespass.

The only question then remaining in this cause for your consideration is, whether the defendant in this case took his own property under such circumstances as constitute a trespass.

To recapture property of which a person hath been unlawfully deprived, is a natural right, sanctioned by the laws; but he must retake his property without breach of the peace, "for the public peace is a superior consideration to any man's property." If I find my horse in a public place, I may lawfully seize him, but I cannot justify the breaking the close of another to take him. If, therefore, the Jury find that there has been any breach of the peace in the mode of recapturing a man's property, they will give damages for the trespass *alone*, that is, for the injury done by the act of taking unlawfully, but not for the value of the property taken. In this case there does

not appear to have been any breach of the peace in the defendant.

The plaintiff's counsel represent this as a hard case on the side of their client.

Here are two honest men, one of whom is to suffer a loss, and you are to judge who shall sustain it. He who merely loaned his horse to a neighbour to perform a journey, or he who purchased the property of the borrower. The law bids the purchaser in such case to beware. *Caveat emptor*, look to it, buyer, that he from whom you purchase has a right to sell.

It is also said, that if the loaner of property is thus protected, it will open a door to imposition and fraud; that the owner may procure some person to vend his property, then recapture it, and share the gains with the supposed borrower.

If the least collusion between the defendant and *Aaron Heacock* had been shewn in this cause, the Court would have directed you to find not merely retributive but exemplary damages for the plaintiff.

As the case now is, we consider the cause clearly with the defendant.

Verdict for the defendant—His costs.

W. C. Harrington and *Amos Marsh*, for plaintiff.
Daniel Chipman, for defendant.

Heacock v. Stoddard.

NATHANIEL HEACOCK
against
PHILO STODDARD.

It is no valid objection to the caption of a deposition, that the attorney to the adverse party was not notified, though living within thirty miles of the place of caption.

IN this cause the plaintiff's counsel offered to read the deposition of *P. H.*

The counsel for the defendant took two exceptions to the caption:

First. That although the defendant lived at *Middletown*, *Rutland* County, more than *thirty miles* from the place of caption, yet the plaintiff's known attorney lived in *Middlebury*, where the deposition was taken, and ought to have been notified.

Secondly. That the deposition is drawn in the hand-writing of *G.* an attorney by profession, and son-in-law to the plaintiff, and so interested.

Vermont Stat. vol. 1. p 87.

Sed per Curiam. The statute requires, that the adverse *party*, and *not the attorney*, shall be notified of the taking of a deposition, if living within thirty miles of the place of caption.

Ib. p. 89.

It is not a connection in a party's family by intermarriage with his daughter, but an interest in the cause, which incapacitates a person from writing or drawing up a deposition.

As to the second exception, the words of the statute are; "that no *agent*, attorney, or person interested in the cause, shall write or draw up the deposition of any witness to be used in such cause."

Here it does not appear that *G.* was the agent or attorney of the plaintiff. The interest supposed to result from his connection by marriage with the plaintiff's family, is not that contemplated by the statute, for it must be *an interest in the cause*, which

incapacitates a person from writing or drawing up a deposition.

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Deposition admitted to be read.

TYLER, Judge, dissenting. He considered *G.* to have been the agent of the plaintiff, within the purview of the act.

W. C. Harrington and *Amos Marsh*, for plaintiff.
Daniel Chipman, for defendant.

IRA ALLEN,
Administrator of ETHAN ALLEN,
against
GIDEON and JONATHAN ORMSBY.

THIS was an appeal from a Freehold Court. The original process was by summons.

A motion was entered to quash the complaint, because no minute was entered upon it of the time of the exhibiting the same by the magistrate issuing the process, in pursuance of the 5th section of the act for the limitation of suits on penal statutes, criminal prosecutions, and actions at law, passed *November* 6th, 1797. *Vermont* Statutes, vol. 2. p. 407.

Upon complaint brought upon the 6th section of the act to prevent forcible entry and detainer, it is not necessary that the magistrate issuing the process should enter on the complaint a minute of the time of its exhibition.

Sed per Curiam. By that section it is enacted, "that when any bill, complaint, &c. shall be exhibited, or any action or suit brought or commenced *in*

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any of the cases mentioned in the preceding sections, then the minute shall be entered." A recurrence to the preceding sections shews the intention of the Legislature to render such minute necessary only in criminal process, actions *qui tam*, or upon penal statutes.

Vermont Stat. vol. 1. p. 215.

The second section of the act to prevent forcible entry and detainer, passed 27th *February*, 1797, empowers the Justices of the Freehold Court to inquire by Jury,

First. As to those who make unlawful and forcible entry into lands, tenements, and other possessions, and with strong hand detain the same.

Secondly. As to those who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same.

In which cases the Freehold Court have power to fine the intruder, and the complainant, by the 5th section of the act, has a right to recover treble damages, with costs, by an action brought upon the statute.

The sixth section of the act points out two other cases:

First. Where a person shall wilfully and without force hold over any lands, tenements, or other possessions after the time for which they are demised or let to him, or to the person under whom he claims.

Secondly. When any person wrongfully and without force by disseisin shall obtain and continue in possession of any lands, tenements, or other possessions, and after demand made in writing for the delivery of the possession thereof by the person having the legal right of such possession, his agent or attor-

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ney, shall refuse or neglect to quit such possession. In which cases the same proceedings shall be had as in cases of forcible entry and detainer.

But in these cases no action is by the statute given to the complainant to recover his treble damages and costs; and further it is provided, "in such cases the original process shall be a summons, and the Justices *of the Freehold Court* shall have no power to assess a fine on the person complained of."

To decide whether the minute of the time of the exhibition of this complaint was necessary to be entered upon it in writing under the official signature of the magistrate issuing the process, we must inquire upon which section of the act the complaint is brought.

The Court consider it to be brought upon the sixth section, and the cases in that section subjecting to no fine, and giving no right of action for a penalty, are not within the purview of the 5th section of the limitation act of *November* 6th, 1797, and therefore no such minute was necessary to be made.

Motion dismissed.

Upon trial at the Supreme Court, on appeal from a FreeholdCourt, the Petit Juror's oath in civil causes must be administered to the Petit Jury.

The Court ordered a Jury impanelled to try the issue.

A question was made, what oath should be administered to the Jury: that prescribed in the act establishing forms of oaths, styled "the Juror's oath at a Freehold Court," *Vermont* Stat. vol. 2. p. 346. or "the Petit Juror's oath in civil causes," prescribed by the same act.

The Court directed the latter to be administered to the Petit Jury.

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The defendants, in the course of the trial, exhibited the inventory of the intestate's lands returned by the administrator, now complainant, to the Judge of probate, in which no mention is made of the law described in the complaint; and insisted, that as the administrator was obligated by law to cause an inventory and appraisal of all the real estate of the deceased intestate to be made and exhibited into the registry of the Court of probate; and this having been done, the administrator could not have any control of the lands belonging to the estate of the intestate, except such as were thus inventoried. *Vermont* Stat. vol. 1. p. 130.

On complaint by an administrator, under the act to prevent forcible entry and detainer, the complainant shall not be estopped from shewing possession in the intestate, because he has omitted to inventory the lands in question in his return to the registry of probate of the intestate's real estate.

Sed per Curiam. The administrator has executed a bond to the Judge of probate, with sufficient surety, for the faithful discharge of his trust. By the conditions of this bond he covenants to make and deliver into the registry of the probate a true and perfect inventory of all and singular the goods, chattels, rights, credits and *estate* of the deceased intestate, which have or shall come into his hands, possession or knowledge. On breach of this bond he must respond in damages, but this cannot destroy his right to maintain an action upon the 66th section of the act for the probate of wills, &c. for the recovery of the seisin or *possession* of any houses, lands, tenements, or hereditaments, on the right of his intestate.

Indeed it may be often prudent in the administrator to institute a suit for the recovery of the seisin or possession of lands of doubtful tenure, that the claim of the estate of the intestate may be rendered certain before he inventories such lands; otherwise he

might embarrass the settlement of the estate by ostensibly augmenting its amount with a mere colour of title.

The inventory exhibited by the administrator to the registry of the probate cannot be read in evidence.

There was another point made in this cause by the defendants, to wit, that the defendant, *Gideon Ormsby*, had no written notice to quit the premises until subsequent to the commencement of the process.

This point was, by agreement of parties, reserved for the opinion of the Court; and by consent of parties a verdict was taken against the two defendants.

The reserved case was never argued, the complainant having entered a discontinuance, *January* term, 1806.

In the interim, an action of ejectment had been brought for the same land by the heirs of *Ethan Allen* against *Jonathan Ormsby*, tenant in actual possession; and at the last mentioned term, verdict for the plaintiffs.

Charles Marsh, for complainant.

W. C. Harrington and *Amos Marsh*, for defendants.

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EDMOND SHERMAN *against* JOSHUA STANTON.

General *indebitatus assumpsit* for work and labour will not lie upon a promise made by the defendant to pay for the work, &c. done under the contract of another, though the work, &c. was done upon the defendant's buildings, and for his eventual benefit.
But if the same declaration contains a count for money had and received, and verdict for the plaintiff, the Court will not set it aside on motion, if it appears that substantial justice has been done between the parties.

MOTION for a new trial.

Plaintiff declared in two general counts:

First. *Indebitatus assumpsit* for work and labour done for *a sum certain.*

Secondly. For money had and received.

At the last term the cause went to the Jury under the general issue, when it appeared in evidence,

That the defendant had contracted with one *Johnson* to erect a forge and mills for him in the town of *Westford*, and was to pay him a certain sum. *Johnson* hired the plaintiff, among others, to work at 4*s*. 6*d*. per day. That before *Johnson* began the work, the plaintiff, apprehensive of his responsibility, refused to labour unless his wages could be secured to him. At this time *Joshua Stanton*, junior, son to the defendant, appeared and persuaded the plaintiff to work, assuring his wages until his father returned from a journey. The plaintiff then went to work. Some weeks afterwards, *Joshua Stanton*, junior, again came to *Westford*, and informed the plaintiff that he had mentioned the circumstance of his apprehensions of *Johnson's* responsibility to his father, who said if the plaintiff would continue to labour, and *Johnson* would draw an order upon him in the plaintiff's favour to the amount of the wages, he would accept it. That some days afterwards the defendant was himself at *Westford*, and in conversation with the plaintiff ratified all his son had promised in his behalf. The plaintiff then continued to work on the forge and mills,

procured the order upon *Johnson* in his favour for the amount of his wages, which defendant protested.

It was also in evidence, that there had been an arbitration between the defendant and *Johnson*, when there was found due from the former to the latter, 150 dollars, which *Johnson* demanded upon the award, but defendant said he would not pay it until he had settled with *Sherman*, as he was holden to see his wages paid. This was subsequent to the protest of the order.

Verdict for the plaintiff, 82 dols. 3 cts. and costs.

At the same term, the following motion was filed:

And now the said *Joshua Stanton*, in Court, by *Daniel Chipman*, his attorney, after verdict in said cause, moves and prays the Court here for a rule on the said *Edmond Sherman* to shew cause, if any he have, why the verdict given in said cause should not be set aside and a new trial had; for that the evidence on the part of the said *Edmond Sherman*, given to the Jury in the trial of said cause, was wholly impertinent and improper to be given to the Jury in support of the declaration in said cause.

Rule granted.

And now at this term,

Amos Marsh, for plaintiff, shewed cause. The Court never grant a new trial where the merits of the action have been fully tried. *Morgan's Essays*, p. 112. There can be no doubt that a special count might have been added to the present declaration,

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and that it would have been fully supported by the evidence adduced. But we shall contend there was no necessity for adding such count, for the evidence well supports both our counts. It is sufficient for us to shew that it supports either of them. We contend that the evidence supports the first count; for it appears the work and labour was actually done for the defendant, *Johnson* being his mere agent.

Sed per Curiam. We are clear the evidence does not support the first count.

Marsh. All the books shew it will well support the second.

The position is now well settled, that money had and received will well lie upon a general or special promise to pay to or for a third person. *Morgan's Essays*, 139. *Strange*, 648. *Weaver* v. *Burroughs.*

An *indebitatus assumpsit* lies for money lent or goods sold at his request to a stranger. *Comyn's Digest*, vol. 1. p. 187.

Where the obligor of a respondentia bond, by indorsement thereon, agreed to pay it to *any assignee*, it was determined that the assignee might maintain general *assumpsit* for it. 2 *Black. Rep.* p. 1269. *Fanner* v. *Meares.*

The doctrine had been established long before in the case of *Jones* v. *Cooper*, *Cowper's Reports*, p. 227.

Daniel Chipman, contra. We have no doubt but a declaration might have been so shaped as to cover

the promise; but that is aside of the present question.

The question now is, whether the evidence supports the count for money had and received. It is useless to multiply authorities to shew where money has been paid on a contract which fails, that this general count will lie. The cases cited do not apply to the point in contest.

The case of *Jones* and *Cooper*, cited from *Cowper's Reports*, appears not to touch the present question. The point mooted and decided upon in that case was, whether the case was within the statute of frauds. The dictum in *Comyns' Digest*, it is obvious, does not apply. But if it did, it appears to have been grounded on a case in *Ventris' Reports*, p. 311. under which that learned reporter has inserted a query, expressive of his doubt of its correctness.

The only case which distantly approaches the present is that of *Tanner* and *Meares*, in *Blackstone's Reports*, and that establishes no such doctrine as is contended for by our opponent, because *Meares* received the money actually, and the only question was, did he agree to pay it to *Tanner* or *Cox*.

W. C. Harrington, for the plaintiff. The Court have the authorities before them. I shall only observe, that the case of *Tanner* v. *Meares* is directly in point. The decision of the Judges was, that the promise made by *Meares* to *Tanner* might maintained in *assumpsit*, and that action was not a special action on the case, but a general *indebitatus assumpsit* for money had and received.

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Per Curiam. Perhaps there is no subject wherein the doctrine is more nice than on what will maintain the action of *assumpsit* for money had and received. It is obvious, however, that since Lord *Mansfield* came into the presidency of the King's Bench, in 1756, this action has been continually extending. "I am," says that great luminary of *English* jurisprudence, in the case of *Towers* v. *Barret*,* "I am a great friend to the action of money had and received. It is a very beneficial action, and founded on the principles of *eternal justice.*" Since his time, the later the decision the more liberal is the extent given to this beneficial action.

* *Durnford & East's Reports*, vol. 1. p. 134.

The merits of this cause have been fairly and fully tried under a count of this nature.

It seems agreed, that if a special count was added to the declaration with the evidence adduced, the plaintiff would recover. Perhaps it may be carrying the principle of this action further than hitherto done in this Court. But the Court consider, upon general principles, that the count for money had and received is supported by the evidence. If some doubt had remained of this, the consideration that ample justice had been done between the parties, would *after verdict* in this case, justify the Court in discharging the rule.

Rule discharged. Verdict affirmed.

Amos Marsh and *W. C. Harrington*, for plaintiff.

Daniel Chipman and *Elnathan Keyes*, for defendant.

GIDEON KING, Appellant,

against

MOSES CATLIN, Appellee.

EJECTMENT to recover possession of south-westwardly room, and chamber over it, half of the hall and stairs, in a house in *Burlington*, erected on Lot No. 21.

Plea, not guilty.

In this cause the Petit Jury returned a special verdict, *January* term, 1802.

That the fee of Lot No. 21. was on the 29th of *April*, 1795, and for a long time before had been in *Ira Allen*. That whilst the fee was in *Allen*, he contracted with one *Joel Woodworth*, who was to erect a dwelling-house on the land; and that within six months after the house should be completed, *Allen* was to have his election either to pay *Woodworth* for the house, or to convey the land to him for a price stipulated. That *Woodworth* erected the house which contained the premises demanded in the declaration. That *Allen* never made his election, but *Woodworth* continued in possession until the 22d of *November*, 1797, when *King*, the plaintiff, attached the house as the property of *Woodworth*. That at the *February* term of *Chittenden* County Court, he recovered judgment, purchased out his writ of execution on the 4th of *March*, 1799, and on the 4th day of *April* following levied it on the premises; which levy, with the

When he who has the fee of land allows another to erect buildings upon it, under a contract, that when the buildings are completed, he will either pay for them, or convey the land at his election, ejectment will lie upon *ouster* of the architee before such election is made. And if a creditor of him who owns the fee levies an execution on the land, and does not include the buildings in the appraisement, ejectment will lie by the creditor of the architee, who has levied an execution on any section of the buildings.

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writ of execution, &c. were duly recorded in the county and town clerks' offices, according to law.

That on the 29th of *April*, 1795, *Moses* and *Lucinda Catlin* attached a number of rights of land in *Burlington*, including Lot No. 21. as the property of *Ira Allen*, upon a writ returnable to the Circuit Court of the *United States*, holden within and for the district of *Vermont*. They recovered judgment against *Allen*, *October* term, 1798. Execution issued 9th of *October*, 1798, and on the 29th of *November* following, was levied on the lands attached, and regular records made according to law.

That on the officer's return of the last mentioned attachment, reservation is made of the dwelling-house aforesaid, described therein as the property of *Joel Woodworth;* and on the levy of the last mentioned writ of execution, the said dwelling-house was not appraised to the defendant *Catlin* as the property of *Ira Allen.*

But whether, upon the whole matter aforesaid, in form aforesaid found, the said *Gideon King* ought by law to recover possession of the premises in the declaration demanded, the Jurors are altogether ignorant, and therefore pray the advice of the Court here.

And if upon the whole matter, by the said Jurors in form aforesaid found, it shall seem to the Court here, that the said *Gideon King* ought by law to recover possession of the premises demanded in the declaration, then the said Jurors upon their oath do say, that the said *Moses Catlin* is guilty in manner and form as the plaintiff in his declaration hath alleged, and do find for the plaintiff to recover posses-

sion of the demanded premises, with one cent damages, and his costs.

And if upon the whole matter aforesaid, by the Jury aforesaid found, it shall seem to the Court here, that the said *Gideon King* ought not by law to recover the said demanded premises, then the said Jurors upon their oath aforesaid do say, that the said *Moses Catlin* is not guilty in manner and form as the plaintiff in his declaration hath alleged, and do find for him to recover his costs.

At this term, the special verdict was argued and decided.

Amos Marsh, for the plaintiff. We shall consider,

First. For what ejectment will lie.

Secondly. By whom it may be maintained.

Thirdly. What kind of contract will sustain this action.

Fourthly. We shall shew, that by common law any contract, accompanied by livery and seisin, will support ejectment.

Fifthly. That there are contracts peculiar to this country, not known in *England*, which upon common law principles will maintain ejectment, and the contract between *Allen* and *Woodworth*, in whose shoes we stand in consequence of the levy of our execution, would have enabled *Woodworth*, and consequently will enable us to maintain this action.

Though the law writers are copious upon the subject of where ejectment will lie, the whole doctrine may be summed up in this position: that ejectment

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will lie wherever a person has been unlawfully disseised of a corporeal hereditament. The complaint in the writ is, that he has been wrongfully ousted of his possession, and wherever this is the case he shall recover in this action.

The only reason assigned in the books why this action will not lie for an incorporeal hereditament is, that the sheriff cannot deliver possession under the writ of *habere facias possessionem;* therefore, wherever a person has been wrongfully ousted of any possession of which the sheriff may deliver him possession, the action of ejectment will well lie.

Secondly. It will always lie in favour of him who has the right of entry, whether in fee, for life, for years, or for the shortest term.

For it will lie by the tenant against his landlord if his term is unexpired. It will lie for common appendant or appurtenant. It lies, say the books, for a boilery of salt, that is, where a man hath no inheritance in the soil, in which there is a well of salt water, but only a lease or grant of so many buckets of water. *Cro. Jac.* 150. It lies *pro prima tonsura*, that is, if a man hath the grant of the first grass that grows on the land every year, he may recover it in ejectment of him who holds it from him. *Cro. Car.* 262. *Ward* v. *Petifer.*

It lies even *pro pastura centum ovium*, for so much land as will feed one hundred sheep; and though this had been doubted, yet we find it confirmed in *Rex* v. *Pendlerenthide*, 3 *Term Rep.* p. 772. and *Bunt* v. *Moore*, 5 *Term Rep.* 329.

In all these cases there is a right of entry in the plaintiff, and the action well lies.

Further. An ejectment need not be for an *entire thing*, as it will lie for the third part of a house. *Sullivan* v. *Seagrove*, *Strange*, 695.

As the right of entry is the key-stone to the action of ejectment, it will be well to inquire, whether the plaintiff had this right of entry in the premises demanded. He may have acquired this by contract, or by mere operation of law. The plaintiff acquired this right by the levy of an execution issued upon a legal judgment against *Woodworth*. By this levy he acquired all the right which *Woodworth* had at the time of the attachment on the mesne process. What right had *Woodworth* at such time? He had contracted with *Allen*, in whom the fee of the land was, to erect the dwelling-house which contained the demanded premises, and was either to have payment for the building, or the chance of purchasing the soil upon which it was erected.

The question is, did this contract give *Woodworth* a right of entry?

We shall shew from the books,

Thirdly. What contracts will support this action, and the leading principle which governed the Courts in admitting such contracts.

In *Doe, ex dem. Winkley*, v. *Pie*, Principal of *Barnard's* Inn, ejectment lay for a cellar held under a parol contract. *Espinasse's Reports of Cases at Nisi Prius*, p. 364, 365, 366. *Day's* edit. p. 363, 364.

To shew that the Courts in *England* will give a very liberal construction to contracts, and allow them to be the grounds of ejectment, we shall read the case of the wine-cellar, *Morgan's Essays*, vol. 2. p. 340.

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The case of Lord *Abington*, same authority, p. 345. 343. shews, that where the intent of the parties is, to *make a lease*, it shall be so considered, though unaccompanied with those formalities which a more rigid construction of the law would render necessary. Though the case of *Right, ex dem. Green*, v. *Proctor*, was decided against the plaintiff, yet all the Judges considered it to be law, that a license to inhabit amounted to a lease. *Burr. Rep.* vol. 4. p. 2208. *Baxter, ex dem. Abrahall*, v. *Brown*, *Black. Rep.* vol. 2. p. 973, 974. A promise to give a lease, accompanied with possession, was ruled to amount to a lease.

In *Bacon's Abridgment*, vol. 4. p. 160. *Gwil.* edit. we have the doctrine, that it may be laid down as a general rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other came into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose.

So, if one (p. 161.) only license another to enjoy such a house or land till such a time, this amounts to a present and certain lease, and may be pleaded as such, though it may be also pleaded as a license; and if it be pleaded as a lease for years, and traversed, the lessee may give the license in evidence to prove it.

In p. 163. of the same author, one said to another, "You shall have a lease of my lands in *D.* for twenty-

one years, paying therefor 10*l.* per annum. Make a lease in writing, and I will seal it." This was agreed by all the Justices to be a good parol lease for twenty-one years, though no writing was made of it; (being before the statute of frauds;) for the intent of the parties was sufficiently expressed, and the making of it in writing was but for further assurance, and left to the lessee if he thought it necessary.

Mr. *Marsh* cited also, *Runnington on Ejectment*, p. 9, 10. 24. 33, 34, 35 and 36.

These authorities, and many others which may be produced, go to shew, that the law will in trials of ejectment favour contracts made by parties, even against third persons, and that

Fourthly. The leading principle is, that where livery and seisin is made, that is, where possession is given by him who has the right of entry, the intent of the parties in any contract shall be carried into effect, and ejectment will lie as a remedy to the injured.

It is true we cannot produce a case exactly in point, but it is obvious,

Fifthly. That there are many contracts respecting lands and buildings, which grow out of the state of society in this country, which are unknown in *England*, but which, in furtherance of justice, must, if they have not already, be supported by the decisions of this Court. A man executes a bond conditioned to convey a lot of land in a wilderness state to another upon the payment of a certain sum by instalments. The obligee goes immediately into possession. At great labour and expense he clears the land and erects buildings upon it, and his expenditures,

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before the last instalment becomes due, surpass the price stipulated for the land. Will not this bond be considered as a lease? Will it not enure against a third person, to whom the obligor might pass the land by deed? or, if set off by execution, could the creditor take more interest in the land and buildings than the debtor possessed? In such cases, must the obligee be obliged to look solely to his bond? and if the obligor becomes bankrupt, lose his labour and expenditures in the erection of buildings? Or in ejectment will not this Court decide, that the obligee has an interest in the land and buildings in which the law will protect him; that as the covenant was accompanied with actual possession, which amounts to livery of seisin, a third person, who might take a deed from the obligor, or who might have the land set off to him on execution, should not hold against him; the grantee or the judgment creditor acquiring by the deed or the levy no more interest in the land and buildings than the original holder had.

The case in the special verdict is one very common, if not peculiar to this country, and calls loudly for judicial interference; and we consider it fairly embraced by the principles and practice which sustain ejectment at common law.

In days of ignorance, the old maxim of *cujus est solum ejus est usque ad cœlum* prevailed; but it has been almost entirely done away in the more modern and more enlightened æra of *English* jurisprudence. The common principles of justice always required, if the owner of land gave another a license to erect a building upon it, subject to a future election by the owner whether to pay for the buidings or vend the land, that the

interest in the buildings, and such possession of the land as is necessary to the enjoyment of it, should be secured to the architect until the fulfilment of the contract, and that such interest of the architect in the buildings should not be defeated by the conveyance of the land to a third person, or by the interference of the creditors to the land owner.

We therefore consider, that by the common law the contract relied upon is such as gave to *Woodworth*, in whose shoes we stand, a right of entry into the premises demanded; that the possession of *Woodworth* was such, that he might have possession delivered to us by the sheriff under the writ of *habere facias possessionem;* that he could, and we can on *ouster* maintain ejectment upon it; that by the principles of the common law, the contract between *Woodworth* and *Allen* being accompanied with livery of seisin or possession, is a contract upon which ejectment can be maintained against a third person; that the Court will, in conformity with the *English* decisions, carry the intent of the parties into effect, and decide that the law so is that the verdict shall be recorded in favour of the plaintiff.

Daniel Chipman, contra. The true question is, has the contract between *Allen* and *Woodworth* so vested the property of the dwelling-house in *Woodworth*, that he could have maintained ejectment against the judgment creditors of *Allen*, when set off to them by execution, or rather, whether the creditors of *Woodworth* can maintain it against the creditors of *Allen*.

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We consider it of small import which way this question would be decided on common law principles; but we will so far notice the cases cited as to observe that they are not in point.

The case quoted in *Morgan's Essays* does not touch the present question. The point in contest there was simply who owned the wine-cellar.

But allowing Mr. *Marsh* the full force of the authorities, they amount to no more than that certain contracts shall hold in ejectment *against the contractor*, but in no case against a third person. In the present case, *Woodworth* might possibly have maintained ejectment against *Allen*, if he had been ousted before the attachments; at least he might have had relief in Chancery to compel a specific performance of the contract; but their private agreement shall not even by the common law affect their creditors. It is observable, that in the case of Lord *Abington*, quoted in *Morgan's Essays*, the Judges doubted whether the contract there in question could affect a third person.

But we consider the common law principles, be they as they may, controlled by our own statute.

By our statutes, livery of seisin is done away. Whether the land passes by deed, or is set off on execution, the perfecting the deed or the levy passes the land without further ceremony, and with the land passes all its appurtenances.

Vermont Stat. vol. 1. p. 189. Also *vide Harwell's* edit. p 32.

Section 5. of the act regulating the conveyance of real estates, and for the prevention of frauds therein, enacts, "that all deeds or other conveyances of lands, tenements or hereditaments, lying in this State, signed and sealed by the party granting the same, having

good and lawful authority thereunto, and signed by two or more witnesses, and acknowledged by such grantor or grantors before a Justice of the Peace, and recorded at length in the clerk's office of the town in which such lands, tenements and hereditaments lie, shall be valid to pass the same without any other *act or ceremony whatever.*"

Here the whole doctrine of livery of seisin is done away. The land passes by the deed, and immediately upon its execution possession attaches to the grantee as against the grantor and his heirs, and upon the record of it, against all others claiming under him or them.

Perhaps it may be said, that in decisions under this statute, if a second purchaser knew of a former deed, though not recorded, he shall not hold against the first grantee, though his deed be recorded first; and it may be insisted, that *Catlin*, the defendant, knew of the contract between *Allen* and *Woodworth*. But we consider that there is a wide difference between a creditor and a purchaser. The purchaser can have no moral inducements to interfere with and defeat a prior contract; but a creditor is at all times countenanced in his vigilance to secure an honest debt. If I know that my neighbour has taken a deed of land, I ought not to defeat his title by a subsequent purchase, and the procuring my deed to be first recorded. But if we are both creditors, and I know that he has taken out a writ to attach the land of our debtor, I may lawfully and honestly hasten to secure my own debt by a prior attachment, and the law will favour the most vigilant.

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Vermont Stat. vol. 1. p 323.

Section 3. of the act directing the levying and serving executions, expressly vests the title of the land in the creditor. "All executions extended and levied upon any houses, lands or tenements as aforesaid, with the return of the officer thereon, being recorded in the records of lands of the town in which such houses, lands or tenements are situated, or in the office wherein deeds respecting the same are required by law to be recorded, and also returned into the office of the Clerk of the Court or Justice of the Peace from which such execution issued, and there recorded, shall, as against such debtor, his heirs and assigns, make a good title to the party for whom such estate was taken, his heirs and assigns for ever."

An attempt is made to scout the old maxim of *cujus est solum*, &c. but if this maxim is to be abandoned, all the respect shewn by the common law and by various statutes, to real in preference to personal estate, will be done away. While the soil remains sacredly secured to him who holds the fee by the solemnities requisite in passing the same, it may be covered with buildings with various owners, who may claim the same, if the doctrine contended for be correct, by various unrecorded and even parol tenures. The whole object of our statute of frauds is to guard the rights of *third persons*, and to protect them from imposition; and it is well worthy of consideration whether this object can be secured if this venerable maxim of the common law be abandoned. A purchaser might then inspect the record, find the fee of a lot of land in the grantor by a succession of well authenticated deeds from the sovereign, and when he had parted with his purchase-money, and

his grantor had become bankrupt, so that he could not avail himself of the covenants in the deed warranting the land to be free of all incumbrances, might discover that the buildings, which he considered as the most valuable part of the purchase, were owned by another, and be exposed to be ejected from his own fee by the possession of the buildings, which is given to the plaintiff in ejectment.

But it seems the plaintiff inclines to consider the contract between *Allen* and *Woodworth* as a lease. But a lease not recorded would expose a third person to the same imposition as a parol contract. I may convey the fee, and my grantee be afterwards surprised by a lease which I had executed for 999 years. This would completely defeat the statute of frauds, but it would be more incongruous to admit of such a lease as operating upon the buildings whilst my grantee had the fee of the land.

On the whole we contend, that though the contract between *Allen* and *Woodworth*, as relative to each other, might have been sanctioned in ejectment, yet it can never affect a *bona fide* creditor to *Allen*; and by the levy of our execution we hold the fee of Lot No. 21. and have a right to the possession of it, *with its appurtenances.*

W. C. Harrington, for the plaintiff. It seems to be granted, that by common law ejectment would have lain in favour of *Woodworth* against *Allen*, if the former had been ousted by the latter; but it is contended, that the plaintiff cannot as a third person maintain it. This will naturally lead to the inquiry into what rights we acquired by the levy of our exe-

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cution. Our levy was on the 10th of *April*, 1799, and was made under the statute of *March* 7th, 1797, entitled, an act directing the levying and serving of executions. This statute is familiar, and without investigating it particularly we confidently assert, that in all cases where an execution is levied on *houses* or lands, all the interest which the debtor held in them at the date of the levy passes to the creditor. All the rights, and no more, which the debtor held at such time, are vested by the levy in the creditor. What interest, what rights had *Woodworth* in the premises demanded? It appears, that the fee of the land was in *Allen*. He contracted with *Woodworth*, that if he would erect a house on the land, when it was finished he would pay for the house or sell the land to him. The possession of the land was therefore delivered to *Woodworth*, who had a qualified interest both in the house and land, and had a legal as well as equitable right to retain possession both of the land and building until the contract had been fulfilled by the election of *Allen* to pay for the house, or vend and convey the land. Before this election was made, the creditors of *Woodworth* and *Allen* both attached. We attached the house as the property of *Woodworth*, and acquired by the levy of our execution all the interest, all the rights, both in the house and land, which *Woodworth* had possessed.

Vermont Stat. vol. 1. p. 321.

The defendant, in the right of his wife, attached the lands as the estate of *Allen*, and acquired, by the levy of his execution, all the interest, all the rights, which *Allen* had at the date of the levy. Sensible that the property of the dwelling-house was never in *Allen*, the defendant, as appears by the officer's re-

turn of the writ, excepted it in his attachment, describing *it as the property of Woodworth*, neither was it appraised to him in the levy of his execution.

With the knowledge of all these facts, the plaintiff now attempts to hold property for which he never paid, and to defeat us of an honest debt in defiance of the common principles of justice. But it seems, blinded by his interest, he has lapsed into a vulgar error, and imagined that the law will give him what common justice would deny him.

He is sensible that he ought not in equity to hold property for which he never paid a cent. His conscience informs him, that it is unjust to defraud the plaintiff. He acknowledges, that if the plaintiff had purchased by deed of *Allen*, and he had taken a subsequent deed, knowing of the former deed, though he should have recorded his deed first, it would not have held against the plaintiff. But he says, creditors do not stand on the same ground as purchasers; and yet the statute last read, by making no such distinction, puts them precisely on the same ground.

As a salvo to his conscience, he principally relies on an almost obsolete maxim of the law, which undoubtedly, in the first rude essays of *English* jurisprudence, when the rights of property were by no means distinctly understood or pointed out, operated as a beneficial general rule; and it may be considered as a general rule in even the more enlightened æra of the municipal law; but this maxim, when carried rigidly into operation, bade such bold defiance to the common notions of right and wrong, that perhaps no general rule has more exceptions, than that he who owns the ground owns every thing upon it. Hence

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we find in the books numerous cases wherein the right of the owner, or he who is interested in buildings or property placed on or growing out of another man's land, are sanctioned in the Courts. Hence the doctrine of emblements, &c. And the nice distinction between that which is nailed and that which is screwed to a building by a tenant, is but a vulgar and natural effort to avoid this unjust maxim.

On the whole we contend, that *Allen* made a legal contract with *Woodworth;* that it was accompanied with livery of seisin; that *Woodworth* had the right of entry, and would have continued to hold it until the contract between him and *Allen* was fulfilled; that in case of *ouster* by *Allen*, *Woodworth* might have maintained ejectment, and the dwelling-house would have been a proper subject for the writ of *habere facias possessionem.*

That by our statute the plaintiff, by the levy of his execution, was invested with all the interest and rights of *Woodworth* in the premises demanded.

That the defendant, by the levy of his execution, was put into the shoes of *Allen;* that he could not by the levy take more interest in the land than *Allen* the debtor had: that *Allen's* interest in the land was a qualified interest subject to the contract; the fee of the land may be said to have been in abeyance until the fulfilment of the contract.

Therefore if *Woodworth* could have maintained ejectment upon *ouster* by *Allen*, we can maintain it against his judgment creditor, the defendant.

That in an equitable view of the subject, (for in cases which may be any wise doubtful the courts of law will always be moved by considerations of equity,)

as the defendant never attached or comprised the value of the dwelling-house in the appraisement which was made on the levy of this execution, he ought not to hold that for which he has never paid. That as our demand against *Woodworth* was *bona fide*, we ought not to be defeated of it in a Court of Justice, contrary to the common principles of justice.

The Court directed judgment to be entered for the plaintiff.

Amos Marsh and *William C. Harrington*, for the plaintiff.

Daniel Chipman and *Elnathan Keyes*, for the defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ADDISON COUNTY, JANUARY TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

JUSTUS BELLAMY *against* JOSEPH CORBAN.

On complaint for the non-entry of a writ of error, the interest must be computed from the date of the execution on the original judgment.

THE defendant filed his complaint for the non-entry of a writ of error.

Judgment of the County Court affirmed.

And now the defendant contended for the computation of interest from the day of the rendering the original judgment.

Sed per Curiam. The interest here allowed under the term "*damages*," is expressly given by the statute "*for the delay* occasioned by the writ of error."

Bellamy v. Corban.

The impetration of the present writ was subsequent to the issuing the writ of execution on the original judgment. The plaintiff below might have taken out his writ of execution immediately upon the rising of the Court. If he did not, it was his own neglect, and he shall not charge his laches on the plaintiff in error. In cases where the *supersedeas* operates hardly, the Court have ample power to remunerate the original plaintiff "in double costs at their discretion." *Vermont* Stat. vol. 1. p. 57.

Let the interest be computed from the day of the date of the writ of execution.

Josias Smith, for the complainant.

RICHARD PEARSE, Appellee,

against

MOSES GODDARD, Appellant.

When the appellant is defaulted, the appellee cannot file a complaint as in case of the non-entry of the appellant, and thus recover 12 per cent. as increase of damages, but must take his debt and usual costs in the action appealed.

AND now the said *Richard Pearse*, appellee, complaint makes, that by the consideration of the County Court holden at *Middlebury*, within and for the County of *Addison* aforesaid, on the first *Monday* of *March*, A.D. 1801, he recovered judgment against the above-mentioned *Moses Goddard* for the sum of 353 dols. 33 cts. damages, and the sum of 11 dols. 45 cts. costs of suit; from which judgment the said *Moses* appealed to this present term of the Supreme Court, and on the first day of the term entered his appeal in said

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Court; but on the sixth day of the same term, being thrice solemnly called to prosecute his said appeal to effect, did not appear, but thereof made default, which default is regularly entered on the docket of the said Supreme Court.

Now the complainant having here ready in Court to be produced, attested copies of said judgment and other necessary evidence, prays the Court to affirm said original judgment with additional costs, and allow the complainant appellee interest on the damages so by him recovered as increase of damages occasioned by the appellant's delay in neglecting to enter and prosecute said appeal to effect at the rate of twelve per centum per annum, as is provided by the fourth section of the act entitled, an act constituting the Supreme Court of Judicature and County Courts, defining their powers, and regulating judicial proceedings.

Vermont Stat. vol. 1. p. 55.

By his attorney,

S. Miller.

The question made is, shall this complaint be sustained?

JACOB, Judge. This complaint is novel; but I consider the judgment of the Court below ought to be affirmed, and the damages increased by the twelve per cent. interest.

The object of the Legislature was to prevent unnecessary delay in the collection of debts. They have therefore enacted, that if an appellant shall neglect to enter and prosecute his appeal to effect, he shall, upon complaint made by the appellee, and af-

firmation of the original judgment, remunerate the appellee by increase of damages occasioned by his delay, at the rate of twelve per centum per annum.

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It appears to me, that this salutary statute check upon the delays of debtors would be entirely evaded by permitting the appellant to make a mere formal entry of his appeal, and then instantly suffer a default.

TYLER, Judge. The words of the statute, " shall neglect to enter *and* prosecute his appeal to effect," are in the *conjunctive*. The appellant must neglect both, or he is not liable on complaint to the payment of the 12 per cent. interest; otherwise, if in the *disjunctive*, " neglect to enter *or* prosecute," if he then had failed in either, I should have been for sustaining the complaint.

Chief Judge. I am in opinion with Judge TYLER. Further it appears to me, that if we sustain this complaint, we shall encounter a difficulty in disposing of the proceedings already had upon the appeal. Here is a default entered, and, to make the record complete, costs must be taxed and damages ascertained. And although the general practice has been, when a party suffering a default intends to be heard in the assessment of damages, that the default is suffered under a rule that the defendant shall be heard in damages, yet as the statute provides, that " when judgment shall be rendered by default, or on demurrer, in any Court in this State, the Judges of such Court shall have full power, by themselves, by the Jury in Court, the report of the clerk, or the report on oath

Vermont Stat. vol. 1. p. 75.

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of one or more judicious person or persons, to be appointed as an inquest by the Court to ascertain the sum due." I do not conceive we could bar the appellant from yet being heard in damages on the default. In which case there would be a complete judgment on the appeal, and another judgment on the affirmation under the complaint if it should be sustained, and full costs in both; and perhaps the result of the inquiry after damages upon the default might lessen the judgment in the Court below to a sum merely nominal.

I will observe further, that a default entered on the docket is not by our practice conclusive against a party until after the rising of the Court. The statute provides, that after default recorded and judgment entered thereon, if before the third day inclusive of the first day of the sitting of the Court, the defendant shall come into Court and move for a trial, he shall be admitted to it upon paying to the adverse party his legal costs. The Court have considered this statute provision to apply only to cases where there has been no appearance by the defendant in Court: therefore, in those cases which the statute did not reach, it has been the practice of the Court on motion, under considerations of equity, to take off a default at any day of the term, under a rule securing to the adverse party ample compensation for all the inconveniences he may sustain by it.

Vermont Stat. vol. 1. p. 75. A default entered on the docket is not conclusive until the rising of the Court.

The complainant had leave to discontinue, and judgment entered upon the default.

Samuel Miller, for appellee.
Josias Smith, for appellant.

ANDREW ABELLS
against
JOHN CHIPMAN, Esquire,
Sheriff of Addison County.

TRESPASS on the case, for an escape.

The declaration sets forth, that the plaintiff, on the 10th day of *July*, 1795, purchased out his writ of attachment against one *Benjamin Barnes*, returnable before *Roswell Hopkins*, Esquire, one of the Justices of the Peace within and for said County, on the 18th of said *July*. That he committed this writ to *Azariah Painter*, the sheriff's deputy, who arrested the body of *Barnes*, and took one *Risden* as bail. That on the day of the Court, in open Court, *Risden* delivered up his principal. That the sheriff's deputy, *Painter*, being present, the Justice commanded *Barnes* into his custody, but that *Painter* refused to take charge of him, whereby he escaped and went at large. That judgment in the Justice's Court was rendered for the plaintiff; defendant appealed, and plaintiff recovered a final judgment at the County Court for the sum of 7*l.* 2*s.* lawful money, damages, and 8*l.* 2*s.* 9*d.* lawful money, costs of suit. That within thirty days from the rendering of the final judgment, he purchased out his writ of execution against *Benjamin Barnes*, and delivered it to the same sheriff's deputy, who in due time returned it *non est*. Profert made of the records of the several Courts, and an averment that the plaintiff hath totally lost his debt by the escape.

Upon the surrender of the principal by his bail on mesne process in a Justice's Court, the magistrate can order him into the custody of some proper officer. If there be none such present, he can appoint one, who may detain him upon the parol order of the magistrate, whilst the Justice's Court continues open, but the officer cannot justify detaining his prisoner one moment after the Court is adjourned, with or without day, unless he has a mittimus from the Justice.

Plea not guilty, and issue to the Jury.

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It appeared from the records of the Justice's Court, that on the original writ the following return was indorsed:

Date.

Then, in obedience to this precept, I arrested the body of the within named *Benjamin Barnes*, and accepted *Onesiphorus Risden* as bail for his appearance at Court, and caused him to indorse his name on the writ.

Azariah Painter, Sheriff's Deputy.

It also appeared, that *Risden* delivered up *Barnes* in open Court; that the Justice directed *Azariah Painter*, then present, to take charge of him.

The other allegations in the declaration were conceded.

The single point made in the defence was, that after rendering the principal into Court, and his commitment by order of the Justice to the custody of the officer, he was not obliged by law to keep or commit him to gaol without a mittimus from the Justice.

To this it was replied, that no mittimus was made out, because the officer repeatedly refused to take *Barnes* into custody.

The plaintiff offered to prove this by parol testimony.

Sed per Curiam. It cannot be admitted. The officer s refusal is *dehors* the record, which merely shews that the Justice ordered *Barnes* into custody. Indeed this circumstance, if it existed, would have

been very improperly attached to the record. When a magistrate of this State commands a proper officer to do a legal duty, his consent is to be presumed.

The cause now went to the Jury, upon the specifications of the record.

The Court, in their charge to the Jury, observed, that they had no doubt but that, upon the surrender of the principal by bail on mesne process in a Justice's Court, the Justice had power to order him for the time being into the custody of a proper officer.

The statute provides, "that where no proper officer shall attend any Justice's Court, and it is necessary there should be some officer for the due exercise of his or their respective jurisdictions, such Justice or Justices shall have power to appoint some proper person to fill the place of such proper officer." *Vermont Stat. vol. 1. p. 179.*

Here a proper officer, the defendant's deputy, was present.

But this power in the Justice to order into custody, and in the officer to hold his prisoner without written precept, can operate only while his Court is in session.

This Court possess no *such* plenitude of power as to imprison a person beyond the limits of their session.

In cases where the surety on mesne process surrenders his principal in a Justice's Court, it is the duty of the Justice to order the person surrendered into the custody of a proper officer, if there be one present; if not, he is to appoint some suitable person to fill the place of such proper officer, and order him

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into his custody. If judgment final be rendered for the plaintiff, he should make out his writ of execution before the rising of his Court, that the defendant may be charged with it. But in cases where the cause is continued to an adjourned session of the Justice's Court, or where an appeal is taken to the County Court, the Justice should, before he adjourns his Court, make out and deliver to a proper officer a mittimus in due form, stating therein the grounds of issuing it, and commanding, in and by the authority of the State, such officer to commit the prisoner to the common gaol of the County, and likewise commanding the keeper of the prison to receive and him safely keep within said prison, until he shall be liberated by due course of law; and of these proceedings the Justice should make record.

If this be omitted, the officer cannot one moment after the rising of the Justice's Court be justified in holding his prisoner, and therefore cannot be chargeable with his escape.

Verdict for the defendant, and his costs.

Samuel Miller and *Josias Smith*, for plaintiff.
Amos Marsh and *Daniel Chipman*, for defendant.

DAVID MORTON *against* JOSHUA WELLS.

THIS was an action on the case, brought to recover one hundred dollars, forfeited for the non-fulfilment of a contract.

The plaintiff declared *in substance* on the following contract:

On agreement this day entered into between *Joshua Wells*, of *Salisbury*, in the County of *Addison*, on the one part, and *David Morton*, of *Middlebury*, State of *Massachusetts*, on the other part, to wit: The said *Wells* agrees to sell to the said *Morton* eighty acres of land lying in good farm off of the south side of his the said *Wells's* farm he now lives on, for the sum of nine dollars per acre, and to procure *a good warrantee deed of the same*, when he hath received 333 dols. 34 cts. in six weeks from this date, and the remainder to be paid by the first day of *December*, 1800; 286 dols. 67 cts. in cash, and the remainder in neat cattle. And the contracting parties further agree, that if either of them fails or forfeits the aforesaid agreement, he shall forfeit to the other *one hundred dollars*, to be recovered by law the same as a note of hand for value received.

In witness whereof the contracting parties hereunto set their hands the 6th day of *November*, in the year of our Lord, 1799.

Joshua Wells.
David Morton.

In presence,
Elisha Morton.
John Chipman.

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The general issue joined, and put to the Jury.

The plaintiff offered to read the written contract.

Objected to for this variance. The declaration sets forth, that the defendant agreed to "*sell and convey eighty acres of his farm,*" and the written contract is, "*to procure a good warrantee deed of the same.*"

When a party declares in substance upon a written contract, he is not obliged to set forth the express words of the contract in his declaration.

Sed per Curiam. The plaintiff has declared in substance, and not *in hæc verba* upon the written contract. The contract exhibited is substantially the same with that declared upon.

The plaintiff now offered to shew by the subscribing witnesses, that the defendant agreed, at the time of the contract, to receive payment in bills of the bank of the *United States.*

Samuel Miller, for defendant. We object to the admission of such evidence. When parties reduce their contract to writing, and it is duly signed and attested, the law will confine them to the writing. Neither party shall controvert it by parol testimony. Certainly it would be dangerous to control written contracts by the loose observations of parties.

If a contract in writing mentions a sum in dollars and cents, the Court will permit it to be shewn in evidence, that the sum was to be paid in United States bank bills; this going not to controvert but to explain the contract.

Sed per Curiam. The position laid down is correct; but the evidence adduced goes, not to controvert but to explain the intention of the parties. The expression in the contract simply states the amount

of 333 dols. 34 cts. Though bills of the *United States* bank cannot be lawfully tendered in payment, yet in fact they pass current at par with gold and silver in all our common bargains and sales. The evidence that the defendant agreed to receive them, and that at the very time of the signing, is a rational explanation of the contract.

Let the evidence be admitted.

TYLER, Judge, dissenting. It was fully proved, that the defendant agreed to receive payment in bills of the *United States* bank.

It further appeared in evidence, that on the 18th day of *December*, 1799, the plaintiff had procured bills of the *U. S.* bank, to the amount of the first payment; that on the evening of the same day, between eight and nine o'clock, he went to the defendant's house, who was from home; and there producing a bundle of bank bills of the bank of the *U. S.* said he had come to pay *Wells* 333 dols. 34 cts. and to demand a deed according to contract.

It appeared also, that the day before the defendant had observed to one of the attesting witnesses to the contract, that if *Morton* failed to make payment, he should prosecute him for the 100 dollars; and on the morning of the day of the tender, the defendant acknowledged that he had conveyed the farm by deed to *Gamaliel Painter*, Esquire; and concluded, that if *Morton* tendered the money, he must lose the 100 dollars.

The defence to the Jury was, that this tender was not good.

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First. That the bills were not counted at the time of the tender.

Secondly. That the tender was made after sunsetting.

Samuel Miller. To make a tender good, it is necessary that the money or other thing should be so exhibited to the view of the party, as that he may be able to determine whether there be sufficient to fulfil the contract, otherwise he may part with his property for nought.

It is therefore laid down in the books, that it is not enough for the person who intends to make a tender to say, I am ready to pay the debt, or to perform the duty; but he must make an actual offer to pay the one or perform the other.

The mortgagor said to the mortgagee, "I am here ready to pay you the money due upon the mortgage," but at the same time kept the money, which was in a bag under his arm. This was holden not to be a good tender. *Bac. Abr.* vol. 6. p. 447.

Considering the nature of the payment, it was peculiarly incumbent on the plaintiff to allow our client a fair opportunity of inspecting the property tendered; for it is a melancholy fact, that even in our transactions with the honest part of the community, the most cautious dealer will find more or less counterfeited bills in every payment made to him. We do not wish to impute any improper design in the defendant, but surely when we are dealing with the most honourable, and bank bills are the medium, a degree of circumspection is necessary.

Upon the second point the law is express. Although the party who ought to pay money or deliver goods, has, until the uttermost convenient time of the last day limited for the payment or delivery to pay the money or deliver the goods, a tender is not good, unless there be, after it is made, time enough before the sun sets, to examine and tell the money, or to examine and take an account of the goods: for if a man should be compelled to receive either money or goods in the dark, there would be great danger of his being imposed upon. *Bac. Abr.* vol. 6. p. 453.

Latt Hall, for the plaintiff. The law cited by our opponents on the first point, is certainly correct, and strictly applicable in cases where the creditor is present: but if he will wilfully absent him from the place where and at the time when the tender is to be made, it could be of no benefit to him to have the money inspected and counted in his absence; and he is estopped from saying the money was not counted, which, whether counted or not, he had unequivocally declared by his absence, he was predetermined not to receive.

When a man incapacitates himself from performing a contract on his part, he shall take no advantage of the informality of a tender made by the other party.

Therefore the rule of tender before sunsetting may be good in general cases; yet in the present case, as the defendant, by conveying the land to Judge *Painter*, had voluntarily incapacitated himself from executing a deed to the plaintiff according to his contract, he shall not now say the tender was made after

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the sun went down. I refused to receive because it was too dark to count and inspect the bills. For even had he been present, and the bills counted in the clearest sunshine, and inspected by the cashier of the bank, he could not have received it, for it is obvious he could not have fulfilled his contract.

The Court, in their charge to the Jury, after stating the evidence, observed,

To make a tender good, the party must, at the latest time of the last day of the term of the contract, before the sun sets, proceed to the dwelling-house, or other usual place of abode of him to whom the tender is to be made, if no other place be provided by the contract, and there produce the money or goods, and offer to comply with the contract. But if the adverse party be absent, or refuse when present to receive the money or goods, or is incapable of performing the contract, he need not count his money, or particularly display the goods, if he can shew otherwise that he has tendered to the amount.

That to make a tender good, the party must, at the latest time, on the last day of the term of the contract, before the sun sets, proceed to the dwelling-house, or other usual place of abode, of him to whom the tender is to be made, if no other place be provided by the contract, and there produce the money or goods, and offer to comply with the contract on his part. But if the other party contracting is absent, he has no occasion to count the money, or particularly display the goods. It will be sufficient that he has already shewn to the witnesses, that he has brought with him and consequently tenders to the amount; and if the other party is present, and refuses to receive the money or goods, or to perform the contract on his part, there will then be no occasion to count the money, or particularly display the goods.

But if he to whom a tender upon a contract to be made is at the time absolutely incapable of performing his part of the contract, the whole reason of counting the money, and particularly displaying the goods tendered, fails.

TYLER, Judge, dissenting. Verdict for the plaintiff, 119 dollars, and costs.

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Lott Hall and ——— ———, for plaintiff.

Daniel Chipman and *Samuel Miller*, for defendant.

WILLIAM FISHER, Appellee,

against

BENJAMIN BROWN, Appellant.

An action of deceit will not lie against a purchaser who makes false affirmations *in his own favour* in order to obtain a day of payment.

BENJAMIN BROWN was attached to answer unto *William Fisher*, in a plea of the case for this, to wit:

That whereas, on the 7th day of *February*, 1798, at *Orwell*, in the County of *Rutland*, he the plaintiff was lawfully possessed of a certain bay horse; and that, at the time and place aforesaid, the defendant applied to and solicited the plaintiff to sell to him the said horse; and did then and there faithfully promise and engage to the plaintiff, that he the defendant was a man of property, and was the owner of a hundred acre lot or farm of land in *Cornwall*, in the County of *Addison*, adjoining to Mr. *Sperry's* farm in *Cornwall*, meaning and intending, as the plaintiff avers, *David Sperry's* farm in *Cornwall;* and that Mr. *Sperry*, meaning and intending the said *David Sperry*, was indebted to him the defendant in a large sum of money, to wit, the sum of thirty dollars, which he

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the defendant would collect and pay to the plaintif in part payment for said horse. And the plaintif says, that he relying on the affirmations, promises and undertakings of the defendant so made as aforesaid, and at the special instance and request of the defendant, bargained and sold to him the said horse at and for a large price, to wit, the price of 63 dols. 33 cts. no part of which sum or price was paid by the defendant to the plaintiff; but the plaintiff, being deceived by and relying upon the false, fraudulent, subtle and deceitful representations and promises of him the defendant, made and entered into by the defendant with a subtle and crafty intent to deceive, injure and defraud the plaintiff, he the plaintiff took and received of the defendant his the defendant's promissory note for the aforesaid sum of 63 dols. 33 cts. which said note is not yet due, and payable; and the plaintiff in fact says, that the defendant his promises and undertakings aforesaid not regarding, but contriving and fraudulently intending craftily and subtlely to deceive and defraud the plaintiff in this behalf, at the time of making and entering into the promises and undertakings aforesaid, was not the owner of any hundred acre lot or farm of land in *Cornwall* aforesaid; nor was the said *Sperry*, of *Cornwall*, indebted to the defendant in the said sum of thirty dollars, or any part thereof. By reason whereof the plaintiff says he is injured, and hath been damaged to the amount of one hundred dollars, to recover which, with just costs, he brings suit, &c.

To this declaration defendant demurred generally.

Daniel Chipman. The plaintiff declares in substance, that he owned a horse; that the defendant set himself up as a man of property, in this especially, that he owned a farm near one *Sperry's*, in *Cornwall*, and that *Sperry* owed him thirty dollars, which should apply in part payment for the horse; that relying on these professions, the plaintiff vended his horse, took the defendant's promissory note for the price payable at a future day not yet come, and then traverses the defendant's affirmations, and demands a sum in damages.

The case is new in precedent, and novel in principle. No case is to be found in the books, where an action lies against a purchaser for mere naked though false professions in his own favour, made to obtain credit. But although no precedent can be found, if there be a principle of law which will sustain this action, we will readily abandon the defence. But we contend that it is new in principle.

The subjects of the municipal law are men, not angels; *men*, with all the mental powers, and all the infirmities incident to human nature. When the buyer and seller contract, the law considers them *as such*, expects from them that they should exercise that portion of reason and discretion which men in the common enjoyment of their mental powers usually possess, and allows a liberal indulgence to those deviations from the strict rules of moral rectitude which men are excited to by a present, personal and prevailing interest. The law expects that the vendor will praise his goods, and thus endeavour to recommend them to the purchaser; that he will demand a high price, though he knows from private informa-

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tion, that the article he proposes to sell has suddenly fell in the market. On the other hand, the law expects that the buyer will cry *nought*, and endeavour to beat down the price, though he knows that the article he is about to purchase is of greater value than what even the owner put upon it, occasioned by its sudden rise in the market, unknown to the vendor; that if the purchaser wants a credit, he will magnify his own property and endeavour to gain the confidence of the seller by the strongest assertions of his ability to fulfil his contract. The conduct of either cannot be squared by the rule of moral rectitude, but the law in such cases refers them to their own reason and discretion, that they must by circumspection and inquiry guard against such imposition, and that the only impositions in contracts from which the law will protect either are such as common prudence cannot guard against.

If this were not so, perhaps there is not a bargain made that might not be the subject of a law-suit. Some advantage is generally gained by one of the contracting parties; and if the courts of law will sit to consider all the glosses given by parties in maturing a contract, and assess damages for every deviation from truth, it would be putting the whole community under guardianship, and avoiding their contracts upon the same principle as we now avoid the contracts of the infant, the idiot and the insane. To shew that the law refers contracting parties to their own discretion and vigilance, and will not render redress for certain impositions, which might have been avoided by the exercise of common discretion, we shall cite a few instances from *Comyns' Digest*,

vol. 1. p. 242. E. 4. under the general head of action upon the case for a deceit.

This action does not lie against him who sells without warranty, if the thing sold had a visible malady, which the vendee had an opportunity of discovering; as if a man sell a horse which he knew to be lame, or that had splint, spavin, &c. which the vendor might perceive by inspection.

So, if a man sell corrupted wine, if the vendee or his servant taste and approve of it.

If he sell land to which he had not a good title, when he does not offer it to sale, but the other proffers himself to be a purchaser.

Nor does it lie, though the vendor affirm falsely of the value; as if he affirm, that lands or jewels are of so much value, when they are not.

So, if he affirm falsely of his right, when another has the possession.

So, if he affirm that he was offered so much by *A.* for the thing sold when he was not.

Why should not the action lie in these cases? Because the purchaser had neglected to exercise common prudence and discretion. In *Buller's Nisi Prius*, p. 31. it is laid down upon the authority of *Salkeld*, 210. that if the seller were out of possession of the personal chattel at the time of the sale, no action will lie against him, though it be not his own, without an express warranty. Whence the distinction between a chattel in and out of the vendor's possession, but because possession is such an acknowledged evidence of property in acceptance of law, that the purchaser might rationally conclude that the property was in the vendor? Common discretion

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could not guard against an imposition of this nature; but if the property is not in the possession of the vendor, no action for deceit will lie against him, though he affirms ever so solemnly *those things* which might lead the purchaser to credit that he owned it; because the purchaser in such case, in the exercise of common discretion, should have sought inquiry of him who had the property actually in possession.

In the present case, if my client boasted of property not in his possesion; if he bragged of owning a farm, and having a note due to him for thirty or thirty thousand dollars; the plaintiff, in the exercise of common discretion, should have placed no reliance upon these vauntings, or, if he intended to rely upon them as an inducement to give a day of payment, he should have been discreet enough to have made inquiry into the truth of them.

A distinction is however to be taken between false affirmations made in favour of another to obtain credit for him, and false affirmations made in a party's own favour. In the first instance a man is justly chargeable, because he who is injured could not be guarded by common precaution against such affirmations, and the law makes no allowance on account of the personal interest of the affirmant; but in the latter instance, the party who listens to a false affirmation made by a person in his own favour, is naturally put upon his guard, and must rely for protection from imposition, upon his own sagacity, or the information of others.

There is another distinction between false affirmations made by a party in his own favour, and *false tokens*. Upon the same principle, an action upon the

case for deceit will not lie in favour of him who is imposed upon by the former, but will lie in favour of him who is imposed upon by the latter.

We make these distinctions because we anticipate that some cases may be produced from the books which may seem to bear on the point in question; but upon investigation they will be found to apply only to cases of false affirmation made in favour of another, and false affirmation accompanied with false tokens.

But we have another exception in demurrer, which goes also to the right of action.

It appears by the declaration, that the plaintiff took a promissory note of the defendant, and in lieu of receiving the price of the horse in hand, or taking the note on demand, gave a day of payment, which has not yet come. We contend that the taking of the note extinguished any equitable and present demand which the plaintiff might have had for the price of the horse. If the present action prevails, what is to become of the promissory note?

In all actions for deceit there must be *damnum et injuria;* but the declaration allegates no especial injury. If the plaintiff prevail, what is to be the measure of damages? Must they not be computed by the *fears* of the plaintiff; and if his apprehensions should prove to be ill-grounded, and the defendant should tender the full amount of the note on the day of payment, no injury would certainly be received by the plaintiff.

If the doctrine be correct, that when a vendor gives a day of payment, and reduces the contract to writing, and afterwards discovers that he has put too

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great reliance upon the ability of his debtor, that he shall have a right to avoid the contract, and rely on recovering the value of the property vended, and not stop here, but bring a suit for damages, grounded on the traverse of some assertion of the purchaser hastily and thoughtlessly made before the conclusion of the contract, this would do away all the assurance and safety of written contracts.

The time of payment is often a weighty consideration in a purchase. If I am to pay in hand, or am offered a short credit, I cannot trade; but if I may have six or twelve months, I may prudently purchase. But if, after I have reduced the contract to writing, I am liable to be saddled with a law-suit, at the caprice or from the apprehensions of my creditor, or because he may learn that I was not quite so wealthy as I had represented myself, all credit and all confidence in written contracts must be at an end.

Therefore, in every view of the subject, we contend that the declaration is insufficient.

If the plaintiff has conducted himself immorally in boastings to obtain credit, as Lord *Kenyon* observed in the case of *Pasley* v. *Freeman*, "it is not every moral and social duty, the neglect of which is the ground of an action." The plaintiff contracted to take a promissory note, and give a day of payment for the price of the horse, and he must rely on that contract, for it cannot be avoided by any false affirmations made by the defendant in his own favour to accelerate the contract, unless he sets forth and shews some special injury sustained as the direct consequence of such false professions.

Durnf. & East, vol. 3. p. 63.

If, however, the present action is not new in precedent and principle, we shall rest until we see it shewn by the plaintiff's counsel.

Seth Storrs, contra. The defendant takes two exceptions in demurrer, both going to the right of action.

First. That an action in the nature of deceit will not lie for any false assertion, however fraudulently intended, which a man makes in favour of himself, by which he induces another to give him credit.

Secondly. That when a promissory note is taken for the price of a chattel sold, the vendor, though he may have been grossly deceived by the false and fraudulent affirmations of the purchaser, cannot sustain an action of deceit, but must rely solely upon his note, and wait until the day of payment mentioned in the note before he brings his action.

We consider the present declaration sufficient, that the action is neither new in principle or precedent.

The general rule of law may be found in *Comyns' Digest*, vol. 1. p. 230. "An action upon the case for a deceit lies when a man does *any* deceit to *the damage of another*."

Lord *Kenyon*, in rendering judgment in the case of *Pasley and another against Freeman, Durnford & East*, vol. 3. p. 64. after quoting this rule, observed, "that he found it laid down by Chief Baron *Comyns*, that it was true he had not cited any authority for this opinion, but his (the Chief Baron's) opinion was of great authority, since he was considered by his cotemporaries as the most able lawyer in *Westminster* Hall."

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In that case, though not strictly in point with the present, we find it decided, that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit, even where the defendant had no interest in the deceit, or had colluded with another who had.

And wherever we find a false affirmation with an intent to defraud, and damages consequentially received, there this action well lies.

Therefore we find in *Comyns' Digest*, vol. 1. p. 236. which author, as our opponent has cited to shew where the action will not lie, we shall cite to shew where it will.

If a man by a false affirmation of a thing within his knowledge deceive in the sale of goods, as if a taverner sell wine for sound and good which he knows to be corrupt. 1 *Roll.* 90. l. 30. 2 *Roll.* 5.

So, if the seller say that they are the goods of *A.* which he has authority to sell, when they are the goods of another, though it is not averred that he knew them to be the goods of a stranger. 1 *Roll.* 91. l. 5.

So, if he sell a horse, *affirming him to have been his horse from a colt*, when he was not. 1 *Roll.* 91. l. 10.

So, if a man by a false affirmance of a thing within his knowledge, *procure a fact to be done which otherwise would not be done.* Ibid. p. 237. A. 10.

So, if a woman give a man *blanda verba æquipollentia* to a promise of marriage, whereby she obtains from him presents and other services. *Cro. Eliz.* 79.

We consider the principle which governed all these decisions, to be the same on which we now rely,

To wit, that there had been false affirmations made with intent to defraud, and damages had ensued.

That the defendant made false affirmations in the present case, is confessed by the demurrer. Were they not with an intent to defraud? It is obvious they were made to induce the plaintiff to part with his property on credit, which he would not otherwise have done.

Has there not been damage and injury sustained by the plaintiff? It is said we have alleged no especial injury in the declaration. The rule of law is, where the facts set forth in a declaration shew *prima facie* an injury, none need especially to be set forth. So, in an action for slanderous words, to say of a man he is a thief or a murderer, that he robbed *A.* on the highway, or ravished *B. carnaliter*, no *per quod* is necessary. And why? Because, as in the present case, the common perception of mankind sees in the facts stated, that if true there has been an injury sustained.

It is said the action will not lie for these false affirmations, because these were mere *blandæ verbæ* used in maturing the contract: but we read, that when a man falsely affirmed that he owned a horse from a colt, the action lay; and that case is not so strong as the present.

It is said that the exercise of common discretion would have guarded the plaintiff against imposition, and therefore the action will not lie; but in the cases cited, and many others familiar to the profession in

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the books, common discretion and vigilance, it would seem, might have guarded the purchaser as securely as in the present case; at least in all the cases excepting that quoted by *Comyns* from *Cro. Eliz.* 79. for it is notorious, that when a man goes abroad to effect a contract of that delicate nature, he generally leaves his discretion at home.

It is also said, that no action for deceit, grounded on false affirmations made in a man's own favour, will lie, but that the cases in the books are upon false affirmations made in favour of another, or accompanied with false tokens.

But this goes abreast of the doctrine just read. "If a man by a false affirmation of a thing within his knowledge procure a fact to be done, the action lies."

This is our case. The defendant falsely affirmed respecting his own property, *and procured a fact to be done*, that is, he obtained credit, and a long day of payment by it.

Indeed it is very difficult to distinguish either as to the immorality or the injury between a lie told to obtain credit for another, or a falsehood affirmed to procure a day of payment for the liar himself. If there is any distinction in morals, a lie told in a man's own favour, to further his own immediate interest, is of a baser nature than that told disinterestedly in favour of a third person. But the effect and injury are the same. It can be of no import to me whether I am induced to part with my property upon a long and doubtful credit to the liar himself, or to another concerning whom he has lied, or whether I have been deceived by false tokens or false speeches.

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But it is objected, that we are precluded from any action until the day of payment arrives, and demand is made upon the note.

We shall shew, that where any security for money is made, or any other act is procured to be done by false affirmations made with intent to defraud, upon the discovery of the fraud, the transactions which were produced by them are considered as null in law, and the party injured may have action for the deceit, or resort to those rights which he only ostensibly parted with, and seek his original remedy in the same manner as if such fraud had not been practised.

The case of *Hogan* v. *Shee*, *Espinasse's Cases at Nisi Prius*, vol. 2. p. 522, 523. was an action of *assumpsit* for money had and received, plea of *non assumpsit*, and was brought to recover a sum of 100*l.* which had been given by the defendant to the plaintiff as a consideration for the defendant's procuring for his brother the place of a cadet in the service of the *East-India* Company, which he had undertaken to do. *Day's* edit. p. 521.

The defendant had given a note by which he promised to repay that sum within three months, in case he did not procure the place within the time limited.

The plaintiff having discovered the deception, brought his action *immediately*, without waiting for the three months to be expired.

The objection to the action was, that it was not maintainable till after the three months were expired.

Lord *Kenyon* ruled, that *it was then maintainable*, and said he had ruled so on other occasions in the case of goods sold on credit; in which case, if it appeared that there had been any fraud on the part of

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the buyer, though the time of credit was not expired, he was of opinion that the party might consider *the credit as void*, and proceed immediately for the recovery of the money. The plaintiff had a verdict.

Day's edit. p. 428.

In the case of *De Symons* v. *Minchwich*, same reporter and volume, p. 430, 431. one part of the defence was, that the action was brought before the time given for credit was expired. *Eyre*, Chief Justice, observed, " that if the defendant meant *to impose on* or defraud the vendor of his goods, the defence will not avail. But those are circumstances for the consideration of the Jury only, to whom he left it." The Jury (which was a special one) found a verdict for the defendant.

Lord *Kenyon's* opinion, which was supported by all the Judges present, in the case of *Puckford* v. *Maxwell, Durnford & East*, vol. 6. p. 52 and 53, confirms the doctrine.

" The defendants, having been arrested for 80*l.* on a *testatum capias* into *Surry*, gave to the plaintiff a draft for 45*l.* saying it would be immediately paid, and agreed to meet the plaintiff a few days afterwards to settle the remainder of the debt; on which the plaintiff agreed that the defendant should be discharged out of custody. The draft was dishonoured, the defendant having no effects in the hands of the drawee. Whereupon the defendant was again arrested on the same affidavit on a *testatum capias* into *Middlesex*. A rule having been obtained calling on the plaintiff to shew cause why the defendant should not be discharged out of custody,

Erskine, in support of the rule, principally relied, that the plaintiff having agreed to accept this bill in part payment of the debt, could not, merely because the bill was dishonoured, treat the transaction *as a nullity*, and arrest the defendant a second time, there being no fraud in the transaction.

Lord *Kenyon*, Ch. J. In cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it a nullity, and act as if no such bill had been given at all.

These questions have frequently arisen at *Nisi Prius*, where they have always been determined the same way. I remember one in particular a few years ago, where a rider in the country gave a draft on a person in *London*, with whom he had no connection whatever; and it was admitted on all hands that it ought to be considered as if no bill had been given at all, and that the original debt remained in force. Our case is much stronger. We contend that the whole transaction was fraudulent in the defendant, and it is so set forth in the declaration; but if some doubts of this should arise, the declaration is not demurrable; but, as in the case of *De Symonds* v. *Minchwich*, it should be left for the consideration of the Jury.

The cases cited by Mr. *Chipman* from *Comyns' Digest* do not apply. They are cases of falsity without warranty. But in the case in question the affirmations of the defendant were in the nature of warranty. The plaintiff relied upon the false affirmations of the defendant that he was a landholder, and had a

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debt due to him; and the defendant thereby warranted his ability to pay the contents of the note. When the discovery was made, he sought redress for the injury received. The note taken through fraud being a nullity in law, the plaintiff might have either resorted to an action to recover the value of the horse, or have brought his action on the case in the nature of deceit. He has elected the latter.

If, however, there be any rule, any case, any decision found, which might seem to be against the present right of action, I shall conclude with quoting the words of Judge *Ashhurst*, in the case of *Pasley* v. *Freeman*. " I should not hesitate to say that it could not be law, for I have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty."

Burnf. & East, vol. 3. p. 62.

Samuel Miller, on the same side. I shall content myself by adding to the pertinent observations of my brother *Storr* a case from *Williams' Abridgment*, vol. 1. p. 124. which shews, that when fraud is discovered, the seller may abandon the contract, and seek his remedy on the deceit.

The custom of the city of *London* authorises an attachment for better security, and it would be well if the same practice was adopted here to prevent the pernicious effects of such deceitful representations as are allegated in our declaration.

If we could find no precedent in point, we all know of the principle which will sustain this action, even that great object of the law which is to protect the honest and unwary from the impositions of the artful and immoral. In pursuance of this principle, the

case of *Pasley* v. *Freeman* was decided. Lord *Kenyon* there observed, "that all laws stand on the best and broadest basis which go to enforce moral and social duties; that it was contended in that action, that it could not be maintained for telling a naked lie, but that proposition was to be taken *sub modo*. If indeed no injury is occasioned by the lie it is not actionable, but if it be attended with damage, it then becomes the subject of an action."

If, therefore, which we do not concede, our action has not the crutches of precedent to rest upon, it is firmly bottomed upon the broad basis of morality.

To the eye of legal science, our declaration may possibly appear insufficient. But to give it support will be doing what in the plain language of common justice is right between man and man.

Mr. *Chipman* arose to reply, but was stopped by the Court.

Per Curiam. When we read the copies of this case at our chambers, we felt desirous, if possible, to support this declaration. We had recourse to the authorities read, and to others which we considered might bear upon the subject, and endeavoured to excite our recollection to cases already decided in this State. But as Judges, we are not to permit even the moral sense to induce us to exalt ourselves into legislators. We sit here to declare the existing and not to create new laws.

The conduct of the defendant, as exhibited in the declaration, is highly reprehensible; and if prece-

[redacted] would not hesitate in [redacted] is sufficient.

[redacted] we observe, [redacted] which reaches the [redacted]

[redacted] have a [redacted] general exercise [redacted] have not arrived at years of [redacted] communicated by [redacted] necessity, or other [redacted] the law will avoid [redacted] and on [redacted] to consent to them. If a contract is made under duress, [redacted] such [redacted] as common dis[redacted] against [redacted] voidable.

But it would be unprecedented and dangerous doctrine would tend to increase impostures, and render the citizens careless in the exercise of their rational powers, to sustain an action upon the case for a deceit upon the traverse of every assertion which a purchaser might make to obtain credit in the making of a contract.

When a man seeks to obtain credit for a chattel, and asserts his ability to pay, here is a proper occasion for the exercise of the discretion and vigilance of the vendor. If the defendant in the present case had falsely and roundly asserted that he was worth ten thousand dollars, and relying upon his assertion, the plaintiff had credited him for his horse, we believe it would not be contended, that an action of this nature would have lain. His falsely specifying the particulars of his pretended estate does not differ the case in a moral view, neither does it give a right of

action, which the plaintiff would not have had in the former case. In both cases the plaintiff should have been equally and sufficiently discreet to make the proper inquiries of others before he credited a stranger; for both the general and particular affirmations of the purchaser stand on the same ground, and resolve into the inquiry, whether he who relies on any naked assertions of a stranger made in his own favour, unaccompanied by false tokens as an inducement to give him credit, has suffered such an imposition as common prudence could not guard against.

It may be observed, that the contract set forth in the declaration was in *Orwell*, and the farm which the defendant affirmed that he owned, and the person who owed him, were said by him to be in *Cornwall*, a town in the vicinity, and in this case it reduces the point in question to this; whether the law will give redress for every imposition, however gross and however readily and easily avoided; and the old and rational doctrine of due discretion, diligence and vigilance in contracting parties shall be done away?

The Court consider further, that some special damage should have been allegated in the declaration; but we will not enlarge upon this point; for as this does not go to the right of action, it might have been cured by jeofails.

In an action of deceit in a contract, some special damage ought to be alleged in the declaration.

The second exception in demurrer we consider as fatal. The doctrine laid down by *Eyre*, Chief Justice, in the case of *De Symons* v. *Minchwich*, is recognised by this Court; that if the credit given was voluntary, subsequent to, and not making any part

If a credit given is voluntary, subsequent to and making no part of the original contract, it may at any time be retracted; but if it make any part of the original contract, it is so material a part of it, that if an action be brought within the time limited for the credit, it cannot legally be supported, unless it was not a *bona fide* purchase by the vendee

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of the original contract, it certainly might at any time be retracted. But if it made part of the contract, it is so material a part of it, that if the action be brought within the time limited for credit, it cannot legally be supported, unless it was not a *bona fide* purchase at the time by the vendee.

It is said, whether *bona fide* purchase or not, is not the subject of demurrer, but should be left to the Jury. This depends on the form of the declaration. If the declaration does not, as in the present case, negate the fairness of the purchase, no issue can be carved out of it, embracing this question.

Judgment, that declaration is insufficient.

Seth Storr and *Samuel Miller*, for plaintiff.
Daniel Chipman and *Loyal Case*, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

ADDISON COUNTY, JUNE ADJOURNED TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, *STEPHEN JACOB*, } *Assistant Judges.*

ZALMON BOOTH *against* AZARIAH TOUSEY.

ACTION on book account.

Judgment to account entered at the last term; and *Enoch Woodbridge*, Esquire, *Argalus Harmon*, and *Belden Seymour*, appointed auditors to examine and adjust the accounts between the parties, and report at this term.

And now *Enoch Woodbridge* and *Argalus Harmon* reported, that they had been legally sworn, that they had notified the parties of the time and place of their sitting, who appeared before them and exhibited their accounts, which they had examined, and after

Where three auditors have been appointed by the Court to audit the book accounts of parties, and report is made by two of them, the Court will admit parol testimony to shew that the parties agreed to proceed before the two reporting auditors in the absence of the third, and will accept their report.

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hearing the evidence adduced, they found due to the plaintiff 58 dols. 25 cts. being the balance of their book accounts.

Josias Smith, for the defendant, moved to set aside this report, because one of the auditors, to wit, *Belden Seymour*, had not attended to examine the book accounts of the parties.

Amos Marsh, for the plaintiff, replied, that before the meeting of the auditors, the parties had agreed to proceed to the audit before the two attesting auditors, in the absence of the third.

Josias Smith. The statute empowers the Court to appoint one or more judicious and disinterested men as auditors. After the Court have elected the number, and the rule has been made out and delivered to the party, the statute makes no provision for a part of them in any case to proceed to the audit.

But it is suggested, that the presence of one was dispensed with by the parties, who agreed to proceed before the remaining two. It is true, the maxim that consent will take away error ought to be carried to a liberal extent; but then this consent should be made properly to appear to the Court. The Court cannot know it from the mere suggestion of the party. It should in some mode be spread on the record, either by being entered on the rule over the signatures of the parties, or noticed by the sitting auditors in their report, and not proved by parol testimony. Report accepted.

Amos Marsh, for plaintiff.
Josias Smith, for defendant.

EDWARD GOULD *against* WILLIAM WEBSTER.

TRESPASS *quare clausum fregit*, for breaking and entering the plaintiff's close in *Ferrisburgh*, containing twenty acres of meadow, ten acres of arable, and ten acres of pasture land, described as the westerly part of Lot No. 129. drawn to the original right of *Henry Davis*, and there doing damage on the 1st of *June*, 1800, with a *continuando* to the 1st of *September* following.

General issue joined, and put to the Jury.

A lease made by the husband during coverture, of land held in right of his wife, of which she had been endowed in consequence of a prior marriage, cannot enure against the woman after a divorce *a vinculo matrimonii*, but may be considered *sub modo* so far as to secure the baron's tenant in his emblements, upon the determination of the lease by the divorce.

It was conceded, that the lands described in the declaration were, on the 21st *December*, 1795, by the commissioners under the probate, set off as dower to *Mary*, the widow of one *Benajah Webster*, in whom the fee was at his decease; that the widow went into possession, and so continued until her marriage with *William Stockman;* that during the coverture, to wit, on the 10th of *August*, 1799, *Stockman* leased the land to the plaintiff by written lease; that before the expiration of the term, to wit, in *January*, 1800, *Stockman* and wife were divorced *a vinculo matrimonii*, and after the divorce the entry was made and the crops taken by the defendant, who justified as the servant of *Mary*.

The question now made upon objection to the lease being read in evidence, is, whether the lease executed by *William Stockman* shall enure against the woman after the divorce.

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Amos Marsh. We object to the shewing of this lease in evidence. We consider it as void. All the interest *William Stockman* ever had to the lands in question was acquired by the marriage and terminated with the divorce.

In analogous cases we find it laid down as law, "that if tenant in dower or by the curtesy makes a lease for years, reserving rent, and die, *this lease is absolutely determined;* so that no acceptance by the heir, or those in reversion, can make it good. For though their estate is *quodammodo* a continuance of the estate of the husband or wife, yet it is a continuance of it only for life, and they have no power to contract for or interfere with the inheritance, and consequently their leases or charges fall off with the estate whereout they were derived, and the lessee has become tenant by sufferance by his continuance of possession after."

So, in case of tenant for life, he can make no leases to continue longer than his own life. *Bacon's Abridgment*, vol. 4. p. 126.

A divorce *a vinculo matrimonii* operates a civil death to the conjugal pair as husband and wife, and should have the same operation in law in all its consequences as a natural death.

Josias Smith, contra. It cannot be controverted, that our lessor, *William Stockman*, at the time of the executing the lease, had full power to make it, and that the lease would have been in force until the expiration of the term, if the divorce had not intervened. We consider the interest of *Mary Webster* in these lands by her intermarriage with *William*

Stockman so vested in him that he had power without her aid to lease them, and his lease, the term being not expired, must operate beyond the divorce.

The law looks upon the husband and wife as one person, and therefore allows but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family. He has an absolute power over her personal, and a qualified power over her real estate. A distinction is however here to be taken between real estate which the wife holds in her own right in fee, and that interest in land which she herself held at the time of her marriage, not of inheritance, but for a term. In the former case she must join with her baron in a deed to pass the fee, or to make a lease, which shall not determine by the dissolution of the coverture.

In the latter case, the husband may execute the lease alone, and it shall enure beyond the coverture; for the wife's interest in the lands is but a mere chattel interest, and subject, with her personal estate, to the control of the husband. *Mary Stockman*, therefore, by her marriage with *William Stockman*, subjected the lands in question to the absolute control of her husband, and the lease made by him during the coverture is valid.

We observe further, that the law is careful that the lessees of those who hold lands dependent on contingencies, shall not suffer by those events against which common foresight cannot guard.

If tenant by dower, curtesy, or for life, after having made a lease and reserved rent, die before the expiration of the term, the tenant shall have his emblements. Surely no human prudence could have

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guarded against a divorce. If, therefore, the lease was determined by the divorce, the defendant, as the servant of *Mary Stockman*, cannot justify the taking the crops or emblements.

But if the interest of our lessor *Stockman* in the lands was destroyed by the divorce, it does not follow that the lease is destroyed. We learn from the books, that a man makes a lease of lands holden by him in the right of his wife, in whom the fee is, and dies, yet if the widow, or even her second husband, accepts rent, the lease shall enure in favour of the tenant in possession to the expiration of the term. *Mary Stockman*, in lieu of inciting the defendant to a trespass, should, upon the dissolution of her marriage by the divorce, have given notice to the plaintiff, who would readily have attorned to her. Her interest in the land, if any existed surely could not justify a trespass.

Amos Marsh. The question now before the Court is of magnitude. If a divorce *a vinculo matrimonii* does not restore to a woman all the estate she held to lands in her own right at the time of the marriage, and the husband during the coverture may carve such an estate out of them by durable leases as may utterly defeat her interest, then every man who marries a widow endowed may dispose of her estate in dower at will, without her consent and act; and this would be in opposition to the statute, which declares, that "no real estate, of which a woman shall be seised, shall pass by deed of herself and baron, unless the deed be acknowledged by her apart from her husband." Will it be contended, that the husband has

the right alone to make a long lease, which may as completely defeat the woman's right as a deed passing the fee, and thus avoid the statute?

It is said the husband might make a lease of those lands which shall now enure after the divorce, because her estate in them was a *chattel interest.* Mr. *Smith* does not speak here with his accustomed accuracy. Estates for years, by statute merchant or statute staple, *elegit*, or the like, are *chattels real*, not in dower, which is an estate for life.

But it seems to be contended, that though the husband's interest in this lease may be destroyed by the divorce, yet it must remain in force as relative to the tenant, who, it is said, would on application have attorned to *Mary.*

But if he had failed to render rent, would an action have lain upon this lease? In whose name should it have been brought. After the attornment, what would have been the situation of the tenant? If the lease contained covenants to be performed on the part of the lessor, upon the breach of those covenants who should the lessee prosecute? If he brought his action against *William Stockman*, he would plead that the lease was extinguished by the divorce, and the covenants abandoned by the attornment. If against *Mary*, she would plead *non est factum.*

Is not the doctrine of attornment almost obsolete in *England?* In this State have we ever adopted it excepting in cases of tenancy at will or at sufferance? When attornment is made by tenant for years under a lease, the lease is assigned under hand and seal, and a formal entry made on the lease of the tenant's attornment, with an acknowledgment of the payment

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of some part of the rent. The present difficulties are then avoided. The assignee in such case cannot plead *non est factum*, for he has made himself a contracting party to the lease. The tenant cannot refuse to render rent, for he is estopped by the attornment. But this can only be effected where the lessor assigns the lease or passes the lands to another, and delivers over the lease with the deed. Before a tenant can safely attorn, he must have plenary evidence exhibited to him in writing of the consent of the lessor. But *Mary Stockman* never was in possession of this lease, could shew no assignment, and could demand no attornment.

It is begging the question to say, that we cannot justify a trespass done in pursuance of her directions. We do not assume to justify a trespass, but the question is, whether trespass or not. If her right of entry was not tolled by the lease, it is no trespass.

By the Court. The Court consider the operation of a divorce *a vinculo matrimonii* to be, to restore to the woman her interest entire in all the real estate which the husband held in her right by the intermarriage, and which by their joint act had not been legally conveyed during the coverture.

The tenant, under a lease made by the husband during the coverture, shall not suffer by the unexpected dissolution of the marriage by the divorce, but shall be secured in his crops or emblements, and shall have egress and regress for that purpose. For this being an action of trespass on the freehold, the whole turns upon the right of entry, and the Court place the tenant under the husband's leases made

during the coverture, after the divorce, in the same situation, as it respects the woman divorced, as the tenant would be placed with respect to the heirs at law of *Benajah Webster*, if the tenancy in dower had been extinguished by the death of the wife, in which case the lease would have been determined, and he would have had his emblements.

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Let the lease be read in evidence *sub modo* to shew that it once was *in esse* to entitle the tenant to his emblements, but not to shew a right in the plaintiff to the possession.

Verdict for the defendant.

Josias Smith, for the plaintiff.
Amos Marsh, for the defendant.

ARGALUS HARMON
against
JOHN BROOME, Esquire, and Son.

IN ERROR. This writ was brought to reverse a judgment rendered by *Addison* County Court, *March* term, 1801, in favour of the now defendants, and against the plaintiff in error. Among the errors assigned, that relied upon was, "that the County Court had taxed costs in the original suit at 23 dols. 25 cts. whereas by law the said County Court ought to have taxed the said costs at the sum of *eleven dol-*

As a general rule, the Court will not in error judge over the County Court in the taxation of costs.

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lars, in that they had taxed travel and term fees for both the original plaintiffs, for *March* and *September* term, 1800, and for *March* term, 1801, when judgment on default was entered at *March* term, 1800, and no additional costs ought to have been taxed at *March* term, 1801.

In nullo est erratum pleaded.

The cause was not argued, the Court having observed, that upon inspection of the record they were persuaded the costs had been taxed correctly. But they considered it as a general principle, that this Court would not in error judge over the inferior Courts in the taxation of costs; these being always under the thumb of the several Courts below, and often regulated by principles of equity and the exercise of sound discretion, the motives to which will not appear on the record.

Upon this suggestion by the Court, the plaintiff in error moved for and had leave to discontinue, with payment of costs.

Luke Strong and *Amos Marsh*, for plaintiff.
Loyal Case, for defendant.

State
v.
J. W.

STATE *against* J. W.

On an indictment for forgery and verdict guilty, the Court will not grant a new trial grounded on motion for new and material evidence, because the delinquent's wife has since the verdict confessed that she perpetrated the fact without the privity of her husband.

AT the last term, the defendant was tried for forgery in the alteration of a promissory note.

The indictment stated, that he had in his possession by purchase the following note:

Bridport, November 12th, 1800.

For value received, I promise to pay *Amos Smith* twenty dollars worth of stock, by the first of *October* next, with*out* use.

As witness,

Ephraim Smith.

That he falsely, wittingly, deceitfully and feloniously, did alter or cause the same to be altered by obliterating the letters and syllable *out* from the word *without*, and then avers that the word *use* intends *interest*.

A second count charged the defendant with uttering and publishing as true, the same false, forged and altered note, knowing the same to have been so forged and altered.

The Jury found him guilty of the first count, and not guilty of the second.

At the same term, after verdict, the defendant moved for a new trial, upon the ground of having since the trial discovered new and material evidence.

His motion was accompanied with his own affidavit and that of *Asa Strong*, who testified, "that he was present at the trial, when *Christiana*, the wife of

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the prisoner, informed him that she well knew how and in what manner and by whom the alteration was made in the note then under consideration. After some hesitation, and repeatedly declaring her husband was innocent, she said she did it herself. She said her husband had left the note with some other papers on a shelf in the bar, on which stood a leaky vessel of water, which was spilled on the papers; that in this way the note got wet; that she, in attempting to smooth the papers, and to rub off the dirt and water that was upon the note with her thumb nail, made the hole which now appears in the note. She said it was hard her husband should suffer when he was innocent; that he blamed her for wetting the papers, and therefore she did not dare to tell him any thing about the hole that she made in the note. When the prisoner was coming from the bar, after the Jury had brought him in guilty, I informed him of what his wife had said. He seemed surprised, and observed, that it was unfortunate he did not know of it before the trial."

At this term the motion was argued.

Samuel Miller. We come forward under some embarrassment in the support of the present motion, arising from our being unable to find, after diligent search, any precedents in the books which will exactly accord with our case; but we consider the principles which have generally governed in the granting of new trials to be with us, and we have the firmest reliance on the justice and clemency of the Court; *that* justice which will not convict the innocent, and *that* clemency which will not suffer a man of hitherto

irreproachable life to be condemned to indelible ignominy, through an unhappy mistake, which grew out of the best affections of the human heart.

Born, educated and married in a neighbouring State, my client there lived for many years in the industrious and honest accumulation of a decent estate. He saw his family, wealth and reputation, annually increase. He lived respected by his friends, and repeatedly honoured by the election of his fellow townsmen with places of public trust.

"With all his blushing honours thick upon him," he removed with his family into this State. *Here*, as his neighbours can witness, he has pursued the same blameless tenor of life, and, until this unhappy incident, preserved the same unspotted character, and so increased his property as to put him far above the temptation to commit a crime of this nature.

The note in question was purchased by him with the charitable design of relieving an embarrassed neighbour. Expecting the promisor to discharge it, he unfortunately took it from his desk, and deposited it with other papers, where it was wet and soiled by the oversetting of a vessel of water. His wife, in her attempts to clean it, rubbed the folds of the paper, and a single syllable was obliterated. Perhaps unconscious of the import or importance of the letters expunged, or fearing to give pain to a husband who had so many years exercised the greatest tenderness towards her, she refrained from informing him of the accident.

But when she entered the hall of justice, and beheld her husband arraigned and on trial for an infamous crime; when she saw the consequences of her own

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imprudence just ready to conclude in the conviction and punishment of a beloved and innocent husband, and in the disgrace and ruin of her family, she could retain the fatal secret no longer. She burst into tears, and disclosed it to the deponent. That he did not immediately communicate it to her husband's counsel, is to be lamented; but so it was, that my unfortunate client, on retiring from the bar after the verdict, first learned the cause of his being made the unexampled spectacle of a man convicted of a crime by a *Vermont* Jury, when he was entirely innocent.

Thus we have laid our unhappy case before the Court; and we request, not that your honours would, as common justice might seem to require, order the defendant to be directly discharged; though this would be congenial with your feelings as men, yet we are sensible as Judges you cannot do this summary justice consistently with those rules of Court, which, though founded in right, sometimes operate hardly upon individuals.

But we move that this oppressive verdict may be set aside, and the defendant have an opportunity to shew his innocence to another Jury, who we doubt not will pronounce him not guilty, without leaving their seats.

State Attorney. The address to the passions by the prisoner's counsel has, I confess, so far engaged mine, that I will not attempt to dissipate his pathetic and affecting illusions by a recurrence to those unadorned and stubborn facts which appeared on the trial, which would at once shew how greatly the pri-

soner and family are indebted to the eloquence of his advocate.

The question now before the Court is a point of dry law. So I am constrained by my official duty to consider it. So the Court are bound in their judicial character to decide upon it.

Stripped of all the vivid colouring of fancy, the case under consideration is simply this:

The prisoner at the bar has been indicted, arraigned and tried for the crime of forging and altering a promissory note. After a long and impartial trial, in which every indulgence was allowed him, in which the subject was minutely investigated, and some of the most eminent counsel at the bar heard with great patience by Court and Jury in his defence, the Jury have found him guilty.

He now moves for a new trial, grounded on the recent discovery of new and material evidence. The amount of this evidence is, that his wife innocently effected the alteration in the note, concealed it from her husband, and the circumstance never came to his knowledge until after the verdict.

The question is, will the Court grant a new trial on this ground?

Suppose a new trial granted. Let us inquire whether the prisoner could avail himself of this newly discovered evidence.

The alteration of the note by the wife was it seems a secret known only to herself.

How shall the prisoner prove to a future Jury that it was done by her?

Will he attempt to prove it by his wife? The law excludes her from testifying for or against her hus-

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band. Will he attempt to prove her declarations by other witnesses? The undeviating rule of law is, "that which is not evidence in itself can never be made so by any circuity." Better would it be to admit the oath than the assertions of the wife. The oath might be some obligation upon her. But her mere loose assertions in favour of a person in whom she has the nearest interest may be readily made, and surely would receive no additional credit by being heard in Court under the oath of another, who testifies not to the truth of her declarations, but simply that he heard her narrate them.

If, therefore, the newly discovered evidence cannot be admitted on the new trial, the grounds of the present motion fail.

Miller. The objection to our motion seems to rest here, that in case a new trial be granted, the prisoner cannot avail himself of the discovery made by the wife.

The rule that husband and wife cannot be witnesses for or against each other, like all other general rules, has its exceptions. We learn from the books, that one exception results from cases of "*evident necessity.*" Is not this in point? When we all perceive that an innocent person is, if this motion does not prevail, about to suffer the punishment of the guilty. Is there not then here an evident necessity of departing from the general rule? If it has been departed from to CONVICT as in the case of Lord *Audley*, where the wife was admitted to convict her husband of a capital crime, shall it not be deviated from in favour of innocence? But if the wife cannot be ad-

mitted to testify, or even her declarations of her husband's innocence, testified to by others, may we not, now we have discovered a clew to this unfortunate transaction, be admitted to shew, by a variety of attending circumstances, the truth of her relation, and may they not amount to a violent, or at least to a probable presumption of the prisoner's innocence?

When a new trial is moved for on account of the discovery of material evidence, what weight such evidence may have with the Jury is not for the consideration of the Court, but merely its *materiality*. It is observable, that on the trial one witness, *Eunice French*, testified to the oversetting a vessel of water and wetting some papers; but at that time his counsel, for want of information, were unable to apply the circumstance in his defence. Undoubtedly many other circumstances of this nature may be proved.

The Attorney for the State has been pleased to pay a compliment to my eloquence which I neither merit or desire. The truth is, the simple narration of the "round unvarnished tale I have delivered," carries with it the force of eloquence without its embellishments. I am charged with addressing myself rather to the passions than the reason of the Court. If I could have presumed to have attempted to interest the feelings of the Judges, I might in lieu of a simple statement of facts, have called the attention of the Court to the pitiable situation of the distressed wife of the prisoner and their tender offspring, who now surround me, and who, by the mute but powerful eloquence of their tears, beg of your honours, *not* mercy for the guilty, but protection for the innocent.

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Of all men I shall not be charged by those who know me with aiming to bias the decisions of this Court by *popular* considerations. The motto of the seal of the Court is with me a favourite maxim: *Fiat justitia ruat cœlum.* But it is certainly true, that the great object of conviction and punishment is the effect which they are to have on society. The reformation of the offender is but a secondary consideration. The crime and the punishment should therefore be necessarily connected in the view of the people. If they consider the former not to have existed, the latter, instead of producing a salutary effect, will shake their confidence in the administration of justice.

By a rigid adherence to the rules of law, this man may be condemned; but the infliction of punishment will have no salutary effect upon the people, for they will not condemn him. He will stand guiltless in the view of his family, for they know his innocence; and what in all events should console and support him, he will stand acquitted by his own conscience.

Motion dismissed.

Daniel Chipman, for the State.
Samuel Miller, for defendant.

Wright v. Cooper and Tousey.

SILAS WRIGHT
against
WILLIAM COOPER and AZARIAH TOUSEY.

TRESPASS. The plaintiff in substance declared, that he was possessed of a farm of 290 acres of land in *Weybridge*, bounded on *Otter* Creek; that the defendants, between the 4th of *May*, 1797, and the 7th of *August*, 1799, erected dams at the head of the falls on *Otter* Creek, within the city of *Vergennes*, which occasioned an unusual rising of the waters, and caused them to overflow his lands, whereby his crops were destroyed, and his farm otherwise injured, *ad damnum*.

An action founded on tort may be sustained against one or more defendants; and if two defendants join in pleading the general issue, and the Jury find one guilty and exculpate the other, this will be no cause for setting aside the verdict.

The action was instituted the 7th of *August*, 1799. The defendants pleaded jointly the general issue, and the cause was tried by the Jury at the last term.

On the hearing it appeared clearly, that the damage was done, and the overflowing of the waters occasioned, by the erection of the dams; that there is a small island in the creek at the head of the falls; that there were two dams connecting this island with its eastern and western shores. The western dam had been erected before the revolution, and had occasioned no damage to the plaintiff until the erection of the eastern; but it had been built upon by one *Fairchild*, who held it by lease as a privilege and appurtenance of the mill site. At the commencement of the action it was owned by the defendant *Cooper*, by deed dated 13th of *February*, 1799, conveying

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the site of the mill and its appurtenances, subject to the incumbrance of *Fairchild's* lease. That the defendant *Cooper*, upon being informed of the injury occasioned by the dam to the lands of the plaintiff and others, directed the dam to be immediately removed, and it was accordingly removed in *November*, 1799.

That the eastern dam was erected in *May*, 1797, by one *Burling*, who held the mill site on that side by lease; but the mill site, with its privileges and appurtenances, were owned by the defendant *Tousey*, who was in possession during the years 1797, 1798, and 1799.

The Jury found the defendant *Tousey* guilty, and assessed damages, and found the defendant *Cooper not guilty.*

After verdict, the defendant *Tousey* filed the following rule by leave of Court.

Silas Wright v. *William Cooper* and *Azariah Tousey.* } *Addison* County, Supreme Court of Judicature, *January* term, A. D. 1802.

And now the said *Azariah Tousey*, in Court here by his attornies, *Daniel Chipman* and *Josias Smith*, after verdict and before judgment rendered thereon, moves a rule upon the said *Silas Wright*, to shew cause, if any he have, why the said verdict should not be set aside.

Because he says,

First. That in said action the said *Silas* declared against him the said *Azariah* and the said *William*

jointly in a plea of trespass on the case for building and erecting certain dams and dykes, &c. on the said falls of *Otter* Creek, and continuing the same, by means of which the lands of the said *Silas*, in his declaration described, were overflowed and injured to his damage, and that the said *Azariah* and *William*, the defendants in said action, jointly pleaded thereto the general issue, which was joined by the said *Silas;* and the Jury, on the issue so joined as aforesaid, found the said *Azariah only* guilty, and the said *William* not guilty: whereas by the law of the land no verdict could be had or rendered, either against the said *Azariah* or the said *William*, separately.

Secondly. That on the trial of said action it appeared, that the said *Azariah* and *William* had not any joint interest in building, erecting, or continuing the said dams, dykes, &c. and a joint action therefor could not by law be maintained against them the said *Azariah* and *William*.

Chipman and *Smith*.

At this term the motion was argued and decided.

Amos Marsh, for the plaintiff, now shewed cause.

The first exception to the verdict, is,

That the Jury have found the defendant *Tousey* guilty, when he and the co-defendant pleaded the general issue jointly.

There is a distinction to be taken between actions on contracts and torts. In the former case all the parties must be sued; in the latter one or more. Therefore we read in *Williams's Abridgment*, vol. 1. p. 2. where *ex contractu*, all parties to be sued; where

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ex delicto, here the trespass is severed, and one or more may be sued.

In the case of *Mitchell* v. *Tarbut and others*, *Term Reports*, vol. 5. p. 649, 650, 651. Lord *Kenyon* remarks, "I have seen the case of *Boson* v. *Sandford* in the different books in which it is reported, in all of which this doctrine is clearly established, that if the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may *sue all or any of the parties*, upon each of whom individually the trespass attaches."

So in *Wilson's Reports*, vol. 1. p. 200. *Sudley* v. *Mott et al.*

In the case of *Rice* v. *Shute*, 5 *Burr.* p. 2612. Lord *Mansfield* said, the distinction is to be found in *all the books*, that in torts all the trespassers need not be made parties. It is left entirely to the option of the plaintiff.

So in the more ancient authorities. *Cro. Car.* p. 239. *Mills* v. *Mills*, and *Cro. Eliz.* p. 701. *Marsh* v. *Vaughen and Veal.* Also in *Carthew*, p. 171, 172. *Sir Peter Rich* v. *Pilkington, Lord Mayor of London*, in the case of a *mandamus*, that where the return is made by several persons, the action may be joint against all or several, *being founded on a tort or injury*. Wherever the proper issue is not guilty, the action is in its nature founded on tort.

Wherever one or more may be sued in the same writ, there the Jury may assess several damages, or find one guilty and exculpate the others.

That the defendants pleaded jointly does not take this action out of the rule. The plaintiff had no con-

trol over their mode of pleading. Their joining in the plea was not demurrable. If they erred it was their own laches, and neither of them can take advantage of it.

The second exception is,

That the defendants could not be joined in the action, because each owned a separate dam, and they had no common interest.

It is totally immaterial, whether the defendants had a joint interest in erecting or continuing the dam, or not. The defendant *Tousey* does not, even in his motion, say that they did not jointly erect them; but if he had laid it right, the authorities already cited, as well as the uniform practice of this Court, shew that an action will lie against several *as* joining in a trespass. If it afterwards shall appear on the trial, that they are not at all interested in the act from which consequential damages have ensued, in trespass on the case, it can be no injury to the one who is found by the Jury to have been interested, that the others are exculpated by the Jury.

The language of the defendant is simply this: I have, it is true, greatly injured my neighbour, and the Jury of my country have said I shall pay him damages; but I beg to be excused, because the plaintiff has unfortunately sued an innocent person with me.

Daniel Chipman, contra. I never wish to contest the received rules of law. There can be no doubt, that when an action is founded on tort, an action well lies against one or more; but that must be where the trespass is *entire*, as in the case cited from *Term Reports*, where one ship was suffered to run against ano-

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ther. But where the torts are separate, the action must be separated. Where a single injury is done, and numbers are concerned in doing of it, certainly the action will lie against one or more of them. But if I own separate farms, and a trespass by separate persons is done on each, can they be joined in one action? Or if two ships run against my vessel at different times, the first doing such damage as would not have sunk her, and the second doing afterwards as actually sunk her, but which would not have happened but from the injury she received from the first assailant, could I join the owners of both these ships in the same action of trespass on the case for sinking my vessel? This is similar to the present action. The plaintiff's farm has been overflowed and injured by the erection of two dams built at different times, each projecting from an island, and obstructing several channels in *Otter* Creek. If either of the dams had been solely erected, the obstruction of the water would not have been such as to have occasioned the injury to the plaintiff, can the separate owners of these dams be joined in the same action for their separate acts? The act of either was independent of the other.

Samuel Miller. The rule to shew cause why the verdict should not be set aside, is in the nature of a demurrer to our declaration; for though it contains two exceptions to the verdict, they both go to the mode of bringing the action.

We have declared against two for an entire injury. The action is founded on tort, and we had a right so to do, as we have fully shewn from the books. Might

not we have entered a *nolle prosequi* against the defendant *Cooper*, and proceeded against *Tousey*. If a *non est* had been returned as to the former, would the writ have abated as to the latter? might not the Jury have assessed separate damages? or were they not warranted in doing as they have done—find one guilty and exculpate the other?

The rule merely requests of the Court to set aside the verdict. The consequences of this must be a *venire de novo*. If the verdict is set aside, shall we not have a right then to enter a *nolle* as to *Cooper*? Could we proceed against him after a verdict with which he is content? He has not joined in the motion for the rule.

Whenever a motion is made to set aside a verdict, the question always arises, *cui bono*. Ample justice has been already done. Guilt is brought home to the actual trespasser, and the innocent has gone free.

Opinion of the Court.

The practice of the Court has ever been to sustain actions founded on tort against one or more defendants.

There is something singular in the present action, as exhibited in evidence on the trial.

The plaintiff has a farm bounded on a river. Two dams have been erected in the stream, which caused the waters to overflow the plaintiff's lands, by which he has been materially injured. The plaintiff has brought his action against the separate owners of these dams. Both dams must have been erected be-

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fore any damage could have resulted. It is contended, that the two owners could not be joined in the same writ, or if they were they could not be distinguished in the verdict.

If the plaintiff had brought his action against one of the owners, his counsel would have argued, that his dam alone did not cause the injury, and so it might have appeared to the Jury.

If he had brought his action against him who erected the second dam, by which the more immediate injury was occasioned, he would say, If the other dam had not been erected, mine would have occasioned no damage. Why did you not combine in the action him who made the first obstruction in the river? If one is responsible, both are; and he who received equal benefit from the dams, ought equally to contribute in repairing the injury caused by them.

The Court therefore consider, that the action will lie against both; and that the Jury were the proper board, having the whole subject before them, to decide where the blame lay.

It appears to the Court, that substantial justice is done by the verdict.

Therefore let the rule be discharged.

Samuel Miller and *Amos Marsh*, for plaintiff.
Daniel Chipman and *Josias Smith*, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, FEBRUARY TERM, A. D. 1802.

JONATHAN ROBINSON, Chief Judge.
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

ISRAEL BEEDLE *against* GRANT and DARLING.

INDEBITATUS ASSUMPSIT for monies had and received.

Issue in fact joined and submitted to the Court.

An action of *indebitatus assumpsit* will not lie to recover the interest accruing upon a judgment debt during the suspension of the execution by the creditor.

Nor can the plaintiff shew an express promise to pay such interest under the general count.

Statement of facts.

It is agreed by the attornies for the parties on record in the above suit, that the defendants did promise the plaintiff to pay him the interest of two sums of money contained in two writs of execution, in favour of the plaintiff and against the defendants, for

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and during the time the plaintiff had delayed the collection of said executions, on application and at the request of the defendants.

John Cook, for the defendants.

Cephas Smith, Junior, for the plaintiff.

The questions made were,

First. Whether a promise of this nature could be embraced in a general count of *indebitatus assumpsit* for money had and received; and if not,

Secondly. Whether the express promise could be shewn in evidence in support of the general count.

John Cook. The plaintiff has declared in general *indebitatus assumpsit.* If he can maintain his action it must be upon an implied promise in the defendants to pay the sum demanded, growing out of the equity of the case.

The elementary and systematic writers are full upon this subject. They have pointed out all the variety of cases in which the action upon implied *assumpsit* will lie, and none of them compare with this case. Neither after assiduous search can we find a single authority or even dictum of a Judge, countenancing a recovery upon an implied promise of this novel kind.

Neither does it grow out of the principle of implied promises, which rests on the obligations of natural justice. When I loan a man my property, natural justice requires he should return it, but not that he should render me interest for the usufruct; for the interest of monies is a creature of the municipal law, and often thwarts the principles of natural justice.

If my unfeeling creditor, who is pursuing me by legal process to prison, should for a time slacken his avaricious pursuit, the law will not imply in me a promise to pay him for this semblance of humanity, when perhaps his object was not to favour me, but to first make his debt certain by judgment, and then by the terrors of his writ of execution compel the sacrifice of my property, or payment of usury, or by a succession of suits from term to term, to recover the interest supposed to accrue on his judgment, oppress me with costs.

If this action will lie in this case, it will lie in every case where a creditor suffers his judgment to remain without taking out his writ of execution. It will gender a multiplicity of vexatious suits, and go abreast of all former practice, which has been in cases where, through the lenity of the creditor, or other causes, the judgment has rested dormant so long as to make the interest an object to bring debt or *scire facias* upon it, and have the interest included in the second judgment.

It being therefore clear, that an action on implied *assumpsit* will not embrace this case, the plaintiff, aware of this, attempts to buttress his declaration by shewing an *express promise*.

If the plaintiff relies upon an express promise, he ought to have brought a special action on the case; for in declaring upon an express *assumpsit* it is always necessary to set out for what the debt became due, and not generally that being indebted he or they promised to pay, &c. and the breach assigned in the declaration should always follow the undertaking

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stated. *Esp. Dig.* p. 134, 135. *Vin. Abr.* vol. 1. p. 270. *Com. Dig.* vol. 1. p. 188.

There appear cogent reasons for obliging the plaintiff to set forth an express promise at large in his declaration.

First. That the defendant may be prepared for his defence.

Secondly. That the Court may judge whether the promise can be sustained in law.

Thirdly. That the promise being spread on the record, the defendant may plead the judgment rendered upon it in bar to an after suit.

Cephas Smith, Junior, *contra*. There can be no doubt that where an action upon an implied promise will lie, an express promise may be shewn under a general count, for it will not lessen or do away a promise which the law implies that a man has made from principles of equity, to shew that he has been honest enough to confirm it by his word.

We contend that the action of implied *assumpsit* well lies here. The defendants owed the plaintiff several sums of money. When these sums were reduced to judgment debts, the interest was suspended, but *non constat* that it ceased to accrue in equity; for this suspension of interest arose *ex necessitate rei*, for on debt on judgment the Court would include the interest from the first to the second judgment. This second judgment of the Court is not founded on contract or express promise, but arises out of the equity of the case, and shews, that the Courts consider that there is an obligation of natural justice binding upon the defendant to pay such interest. The plaintiff here delayed the levy of his writs of execu-

tion, and was damaged in his interest by so doing; and surely, though this particular case is not noted in the books, the general principle will apply; and the interest of the several sums accruing upon the judgments will be considered by the Court as monies of the plaintiff in the hands of the defendant, which in equity and good conscience they ought to refund him.

The reasons rendered why we should have declared specially are done away by the statement of the evidence signed by the counsel, and made part of the record. From this statement the defendants might be and were prepared for their defence. The Court could judge of the legality of the contract, and the defendants may be able to plead the judgment in bar to a future suit.

Per Curiam. The Court are clearly of opinion, that an action of general *indebitatus assumpsit* will not lie in this case; that the plaintiff should have declared on the express promise, which cannot be shewn under a general count, where the general count cannot be sustained.

Judgment for defendants—Costs.

Cephas Smith, Junior, for plaintiff.
John Cook, for defendants.

Little
v.
Meachum.

JONATHAN LITTLE *against* J. and P. MEACHUM.

On the hearing in damages upon default in ejectment brought to recover possession of lands holden by the levy of an execution, the mesne profits are to be computed *from the date of the levy of the execution*, and not from the six months allowed by the statute for the defendant to redeem.

EJECTMENT to recover possession of nineteen acres and nineteen perches of land set off to the plaintiff on execution.

Defaulted. Defendants to be heard in the assessment of damages. By agreement of parties, damages to be assessed by the Court.

The facts as they appeared to the Court were,

That at the *November* term of *Rutland* County Court, 1799, the plaintiff recovered judgment against the present defendants for 501 dols. 70 cts. debt and costs; that on the 4th of *May*, 1800, he extended his execution on the lands described in the declaration, which were appraised at 339 dols. 84 cts. and legally set off to the plaintiff, in part satisfaction of the writ of execution; that on the 5th *November*, 1800, the plaintiff commenced the present suit.

The question made was, from what time the mesne profits should be computed; whether from the date of the levy of the execution, or from the 4th of *November*, 1800, which was the day of the expiration of the *six months* allowed by the statute for the defendants to redeem.

Daniel Chipman, for the defendants, contended for the latter term.

Vermont Stat. vol. 1. p. 321.

The 5th section of the act directing the levying and serving of executions, gives a right to a debtor whose lands are appraised and set off to satisfy an execution upon payment of the full sums of debt, da-

mages and costs in the writ of execution contained, with 12 per cent. interest, within the term of six months from the time the execution was extended to exonerate his lands from the levy.

The 6th section restrains the creditor from entering upon the lands until after the expiration of the six months, and, upon non-payment of the redemption money, empowers him to enter without any previous process or notice to the debtor.

It then charges the debtor or debtors, or their legal representatives remaining in possession, with the rents, profits and improvement of such estate, if it is not redeemed, the value of which shall, if the parties cannot agree, be determined by the appraisal of three judicious and disinterested freeholders. The tender of the sum rendered by the appraisal being made and kept good, shall be a sufficient bar to any action which may be brought for the mesne profits; and if the debtor or debtors shall refuse or neglect to pay such sum, the creditor shall have a right to an action on the case, founded on the statute to recover the same, with additional damages and costs.

Here it is manifest the action of ejectment will not lie, until after the expiration of the term of redemption, and that the Legislature, by providing another remedy for the creditor to recover the mesne profits accruing during the term of six months, have excluded the Court from the consideration of the rents, profits and improvements of the land extended upon during the term allowed for redemption under the action of ejectment.

If the plaintiff would have his remedy, he must pursue the statute process. He should first have en-

Little v. Meachum.

deavoured to agree with the defendants upon the value of the mesne profits. Failing, he should have procured appraisers, and have demanded the sum found by the appraisal, and then he would be entitled to recover *that sum;* not such sum as a Court or Jury should find to be the value of the mesne profits; for the statute had appointed another board to decide this question, who, by ocular inspection of the land, and by evidence acquired in the vicinity, might be better able than a Court or Jury to decide with precision.

Lott Hall, contra. Though the statute has pointed out a mode of ascertaining the value and for the recovery of the mesne profits, it does not follow that the plaintiff is deprived of his common law privilege of having this point decided under the action of ejectment.

According to the act, either party had the privilege of pursuing the statute mode. Here it appears they have neither had recourse to it. It will be therefore intended that they both meant to rest on the common law mode. This is confirmed by the reference to this Court to assess the damages; for by comparing the dates it will be found there can be no other damages to be assessed than those including the mesne profits accruing during the term allowed the defendants for redemption, which expired on the 4th of *November*, 1800, and the plaintiff instituted his present action of ejectment on the 5th of the same month.

We conceive it to be well worthy the consideration of this Court whether they will now turn the plain-

tiff over to a new action to recover the mesne profits, when without further expense the value of them can be here assessed.

Little v. Meachum.

The Court decided, that the plaintiff might shew in evidence the value of the mesne profits from the date of the levy of the writ of execution.

Lott Hall and *Cephas Smith*, Junior, for plaintiff.
Daniel Chipman, for defendants.

WILLIAM WEBBER *against* AMOS IVES.

PLAINTIFF declared in a plea of trespass *quare clausum fregit*, and taking away sundry horned cattle, *ad damnum*, 300 dollars.

Upon objection to the acceptance of a report of referees, the Court will only hear evidence relative to corruption in the referees, or misconduct in their not following the rule, either by neglecting to notify or hear the parties, or taking into consideration matters not submitted to them.

At the stated *February* term of this Court, 1801, this cause was referred, by order of Court and agreement of parties, to the determination of *Stephen Williams*, *Jonathan Bell* and *Daniel Marsh*, a report of whom, or the major part of them, to be final and conclusive between the parties; *Stephen Williams* to be chairman, and to notify the parties of the time and place of meeting; and if either party, after being duly notified, neglect to attend, the referees to proceed *ex parte*.

At the present term, a major part of the referees made the following report, indorsed upon the copy of the rule of Court:

Webber v. Ives.

Rutland, 10th *June*, 1801.

To the Honourable, &c.

Your referees, to whom was referred this cause, after having heard the parties and their evidence, beg leave to report, that we find that the defendant is guilty in manner and form as the plaintiff in his declaration hath alleged; and find for the plaintiff to recover of the defendant the sum of two hundred and twenty-eight dollars and thirty-eight cents damages, and his costs.

Costs of reference, 13 dollars.

Stephen Williams, } Referees.
Daniel Marsh, }

Darius Chipman, for the defendant, objected to the acceptance of this report, offering to shew by the affidavit of the defendant, that there was a material witness on the part of the defendant absent at the hearing before the referees, whose personal attendance or deposition he could not then procure; but that he should be able, on a rehearing, to avail himself of his testimony.

Sed per Curiam. Upon objection to the acceptance of a report of referees, the Court will only hear evidence relative to corruption in the referees, or misconduct in their not following the rule, either by neglecting properly to notify or hear the parties, or taking into consideration matters not submitted to them.

Report accepted.

At the following *July* adjourned term, the defendant moved for a new trial, supported by the affidavit of *Stephen Clerk*, who testified that he was interested in the cause, and had eventually to respond the judgment; that he had attended the reference; that he had discovered new and material evidence since the hearing before the referees, to wit, *Timothy Green* and *Mary Boys;* and then stated what he expected they would testify, which appeared to be material in the issue.

Sed per Curiam. The Court will not grant a new trial for the recent discovery of new and material evidence, supported by the single affidavit of the party, or him in interest. The motion must be accompanied with the affidavits of the witnesses recently discovered.

The Court will not grant a new trial for the recent discovery of material evidence, supported by the single affidavit of the party, or him in interest. The motion must be accompanied with the affidavits of the witnesses recently discovered.

Motion dismissed.

—— ——, for plaintiff.

Darius Chipman, for defendant.

CASES

DETERMINED IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF VERMONT.

RUTLAND COUNTY, JULY ADJOURNED TERM, A. D. 1802.

JONATHAN ROBINSON, *Chief Judge.*
ROYALL TYLER, } *Assistant Judges.*
STEPHEN JACOB, }

STATE *against* J. H.

A warrant to apprehend a person charged with a crime upon the complaint of a private informer, cannot legally issue without oath made by the complainant. Though the complaint and the *capias* recite it was under oath, yet nothing short of the magistrate's certificate can be sufficient evidence that the oath was administered.

THE defendant had been arrested and examined before Mr. Justice *Horton* upon a charge of wilful and corrupt perjury, upon the complaint of *Amos Colvin*, a *private informer*. The Justice ordered the defendant to recognise with surety in 500 dollars for his personal appearance at and before the Supreme Court now sitting. Upon his failing to procure bail,

the magistrate issued a mittimus, and returned attested copies of his proceedings into Court. State v. J. H.

The defendant came into Court in the custody of the officer serving the mittimus, and moved to be discharged, and that the process might be quashed.

First. Because the complaint was made by a private informer, not under oath.

Secondly. That a private informer could not legally prefer a complaint of this nature.

Upon inspection of the copies of the proceedings of the justice, it appeared, that the complainant had recited in his complaint that it was made *on oath;* but there was no certificate by the Justice of his having administered any oath, and in the *capias* it was not set forth that the complaint was made under oath, but in the mittimus it was.

——— ———, in support of the motion. The personal liberty and reputation of the subject are held so sacred, that by the common law no warrant to apprehend any person for a crime can issue without oath, either personal or official. *Hale's Pleas of the Crown*, p. 595.

The eleventh section of the State Constitution reprobates in express terms warrants issued without oath or affirmation. Perhaps some reliance may be had upon the recital in the complaint and mittimus, that the oath was administered; but the former must be considered as mere form, or at most as the unofficial assertion of the complainant, the latter but a mere recital of the caption of the complaint, and neither can amount to that which can only be considered as evidence of the oath, which is the Justice's certificate

State v. J. H.

of the administration of the oath to the complainant of date precedent to the issuing of the *capias*.

Samuel Walker, contra. We contend the position *totis viribus*, "that at common law every warrant for the apprehension of persons charged with crimes by a private informer, must be supported by complaint under oath."

There are some crimes so aggravated, and the immediate apprehension of the criminal is so apparently for the safety of society, that he may by common law be apprehended even without warrant, and these include all cases of atrocious felony; and what crime is more felonious or baneful to society, than perjury? a crime which not only injures individuals, but pollutes the stream of justice at its very fount. It is the duty of all good people, whether in or out of office, to bring such offenders to condign punishment; and if any one, as a private informer, prefers his complaint to a magistrate, it is in the sound discretion of the magistrate to issue his *capias* with or without the oath of the complainant. The crime may be of such magnitude, that a faithful and prudent magistrate, to prevent escape, may order the immediate apprehension of the offender without warrant, and promulgate a hue and cry. In another case he may, from his personal knowledge of the complainant's character for veracity, issue his warrant without oath made. In some cases he may require the oath of the informer; and in all cases it is a subject of discretion to be exercised by the magistrate at the time of issuing the *capias*, and the process cannot afterwards on this account be impeached.

Sergeant *Hawkins* says expressly, "It is safe to set forth, that the party is charged upon oath; *but this is not necessary.*" *Hawk. P. C.* vol. 2. c. 16. s. 17.

We had hoped more candour in our opponent than is discovered in his reference to the State Constitution; the eleventh section of which does not reprobate warrants without oath or affirmation *generally*, but is directed against a particular species of warrants.

A people, like individuals, will as frequently guard against those evils which they dread, as against those they feel or have occasion to dread. By our successful struggles for independence, from colonies we have become a nation; and it is curious to observe, that all the State Constitutions bear the marks of our former political servitude. The evils we feared or experienced as colonists, are scrupulously guarded against by bills of unalienable rights, when to the reflecting mind it is apparent, that few or none of those evils are experienced or to be apprehended in our state of sovereignty.

The framers of the constitution of *Vermont* had undoubtedly heard of the Secretary of State's warrants, and of the celebrated case of *Wilkes* and the King's messengers, in the mother country; to encourage the revolutionary spirit these things were actutively disseminated among the people. They therefore, not clearly distinguishing between that restraint upon the royal prerogative, which by progressive steps has established *English* liberty, and which should ever be precious to Englishmen, and that restraint upon magistrates elected in our republican mode, who hold their brief authority on the annual

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good opinion of the people, inserted the eleventh section of the constitution, which declares,

"That the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and therefore warrants without oath or affirmation first made, affording sufficient foundation for them, or whereby any officer or *messenger* may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted."

But if the oath of the complainant should be considered as necessary to the validity of the present process, we consider, that in this case such oath was actually administered, and that there is sufficient evidence of it in the process.

The very act of issuing a *capias* upon a complaint, which recites that it was made under oath, is a recognition by the magistrate of the oath's having been administered. But we do not rest here. We shew the magistrate's express declaration under his official signature to the mittimus, that the oath had been duly administered.

Process quashed. Defendant discharged.

——— ———, for the motion.

Samuel Walker, contra.

JONAS JOHNSON *against* JEDEDIAH CLARK.

IN the trial of this cause, issue to the Jury. Plaintiff offered the deposition of *James Robinson*, since deceased.

A deposition illegally taken cannot be read after the deponent's decease, upon the principle that it is the best evidence which can now be produced.

Cephas Smith, Junior, objected to the reading of it in evidence.

It was conceded by the plaintiff's counsel, that if the deponent was alive the deposition could not be read, as it was drawn up in the hand-writing of the plaintiff's attorney, and taken by a Justice of the Peace interested in the cause. But,

Samuel Walker insisted, that a voluntary affidavit or deposition extrajudicially taken, might be read on the decease of the deponent; and cited 1 Ld. *Raym.* p. 744. *Tilly* v. *C*—, Vol. 2. ib. *Price* v. *Earl of Torrington*, p. 873. Ib. 1166. 1 *Strange*, p. 35. *Styl.* p. 446. *Sacheverel* v. *Sacheverel.* 2 *Strange*, p. 1129. margin, *Warren, ex dem. Webb*, v. *Grenville*. And as *advisory*, *Root's Reports*, p. 81. *Roy* v. *Brush.*

Sed per Curiam. The deposition cannot be read. The objections are, that it is in the hand-writing of the party's attorney, and taken by a Justice of the Peace, interested in the cause. The authorities cited embrace cases where depositions were taken legally, though not in the causes pending. By the decease of the deponents they obtained efficacy under the ge-

Johnson v. Clark.

neral principle of constituting the best evidence which could be produced. But here the deposition is illegally taken. The decease of the deponent cannot render that valid which was intrinsically void. It would be setting aside the Chancery process of taking depositions *in perpetuam rei memoriam*, to sanction the admission of depositions taken otherwise than agreeably to the statute.

Daniel Chipman and *Samuel Walker*, for the plaintiff.

John Cook, *Cephas Smith*, and —— ——, for the defendant.

JOHN COOK, Esquire,
against
BEN PORTER, Esquire.

If a declaration contains a general count within the jurisdiction of the Court, it will not vitiate it, because the plaintiff has added a second count, exclusively within the jurisdiction of a single magistrate.

IN ERROR. This writ was brought to reverse a judgment of *Orange* County Court, rendered *December* term, 1800, in favour of the now defendant against the plaintiff in error.

In the original declaration, the plaintiff counted on a promissory note for 70 dollars, and added another count for *five dollars*, money advanced and lent. Judgment rendered on default.

Error assigned, that the declaration was insufficient: "for that the said *Ben Porter's* declaration consisted of two counts, the one for *five dollars* money lent and advanced; which said count was within

the jurisdiction of a Justice of the Peace, and not within the jurisdiction of the County Court, and that said sum in damages was rendered entire on both counts."

Oyer of the record craved and produced. *In nullo est erratum* pleaded.

Per Curiam. The Court have inspected the record, and do not incline to consume time in hearing argument upon a case so plain.

The object of the Legislature in restricting small demands within the jurisdiction of a single magistrate does not apply here. It was to prevent the expense of litigation in the higher Courts upon controversies of trivial moment.

But where a creditor has a demand within the jurisdiction of the County Court, and is about to commence a suit upon it, it is not only legal but *laudable* in him to bring forward such other demands as may be joined in the same declaration, though separately considered, they may be within the jurisdiction of a Justice of the Peace. In this mode he will often save the defendant those costs which might have accrued from the prosecution of the lesser demands before a single magistrate; and one suit without augmented expense may settle several controversies between the parties. To discourage this practice, which has long and very generally prevailed, would be to violate the spirit of the act establishing the Justice's jurisdiction.

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Upon this intimation by the Court, the parties accommodated, and the suit was withdrawn by consent of parties.

John Cook, pro se.
Cephas Smith, Junior, for defendant.

JEREMIAH ADAMS *against* JOHN BROWNSON.

In an action brought against a surviving partner upon a promissory note, alleged to have been signed by the deceased partner in his life-time, in the name of the firm, proofs of his confession that he signed it, admitted to be given in evidence.

CASE on promissory note.

Attach *John Brownson*, surviving partner of the late firm of *Hyde & Brownson*, to answer, &c. to *Jeremiah Adams*, &c. for that whereas *Lemuel Hyde*, since deceased, and the said *John Brownson*, merchants, trading in company at *Whitehall*, in the County of *Washington* and State of *New-York*, to wit, at *Rutland*, &c. on the 1st day of *August*, 1799, did make, execute and deliver to the plaintiff their certain memorandum or note in writing commonly called a promissory note, of that date, subscribed with the proper hand of the said *Lemuel Hyde*, for himself and the said *John Brownson*, under the firm of *Hyde & Brownson*, in and by which promissory note, for value received of the plaintiff, they promised to pay him 500 dollars in six months from the date of said note, with legal interest of the State of *New-York*. By reason of all which the said *John Brownson*, as surviving partner of said firm, became obligated to pay, &c. and assumed, &c.

Plea, *non assumpsit*.

Defence, that no partnership ever existed between the defendant and *Lemuel Hyde*.

The plaintiff offered in evidence the note declared upon, and offered to prove the signature of *Hyde* by his confession.

The counsel for the defendant insisted, that as there is a subscribing witness to the note, he should be produced. They observed, that it was not the most substantial part of their defence that the note was not signed by *Hyde;* but they wished to examine the subscribing witness, and expected to have shewn by him, that though the note might have been signed by *Hyde* in the name of the supposed firm of *Hyde & Brownson*, yet that the plaintiff did not credit or rely entirely on the existence of the partnership at the time of the contract, but charged the goods, which were the consideration of the note, thirty per cent. above their real value in the market; and it was well understood between the plaintiff and *Hyde*, at the time of making the note, that the extra advance was made in the price of the goods, on account, as the plaintiff expressed it, of its being uncertain whether he could prove the partnership; that relying upon the plaintiff's producing the witness, the defendant had failed to summon him. They therefore objected to the confession of *Hyde* being heard in evidence.

Jacob, Judge. I am for admitting the confession of *Hyde* to prove the execution of the note. This is a distinct matter from the question of copartnership.

Adams v. Brownson.

To put the plaintiff upon producing the subscribing witness, will operate a surprise upon him.

TYLER, Judge. I have long considered that some general rule ought to be adopted to prevent the defendant in action upon promissory note from surprising the plaintiff by insisting on trial upon the testimony of the subscribing witness, in cases where it is obvious the execution of the note is not designed as a substantial defence, but merely to operate delay. Perhaps this evil can better be corrected in Courts which have the original jurisdiction of causes of this nature; and it would be desirable that the several County Courts would adopt as a general rule, "that in all actions upon promissory note, the execution of the note should be considered as confined, unless the defendant, by the second day of the term of entry, should give notice to the plaintiff, by a minute on the docket, signed by his counsel, or attested by the Clerk of the Court, that he meant to contest its execution."

As no such rule exists, in the present case I consider that the defendant has a right to examine the subscribing witness, and might safely rely on the plaintiff's producing him.

It is not stated that the defendant personally signed this note, or had any individual knowledge of the contract. If he has assumed to pay it, it is by operation of law, and dependent on the existence of the partnership between him and *Lemuel Hyde*, since deceased. The principle of law which renders the partners in a firm of merchants accountable for the contracts of each other, is directed to prevent imposition, that he who is bankrupt shall not obtain credit

by a connection merely ostensible with him who is opulent, and that he who is opulent shall not take the avails of a contract made by a seeming partner, who is unable to respond for them. Therefore, in all cases of this nature, the Court have allowed a very liberal latitude. In the proof of partnership a plaintiff prosecuting defendants as partners in trade has not been confined to shew articles of copartnership. The annunciation of the firm in the public newspapers, an open store, sign-board, or books of the company. But he may shew a variety of joint contracts made by them in such manner as would induce a general and rational belief that they were connected in trade. This has been done to prevent imposition upon those who might deal with them.

If in the course of this trial it should remain doubtful whether the defendant was in partnership with the deceased at the time of the contract, and the testimony should rather preponderate in favour of a partnership, it would be a matter of importance with me to discover in what light the plaintiff viewed the connection between *Brownson* and *Hyde* at the time of the making the note in question. Did he part with his property upon the credit of the firm, or did he contract with *Hyde*, understanding that the partnership was a matter of uncertainty, and that its existence was denied by the defendant? Is the plaintiff one whom the law will and ought to protect from imposition, or has he voluntarily and with his eyes open, entered into the contract with *Hyde*, and made an advance upon his property as a premium for his risk in proving the partnership.

Adams v. Brownson.

I am not therefore for dispensing with the attendance of the subscribing witness; and it is my opinion that evidence of the confession of *Hyde* to the execution of this note, cannot be admitted. But as I would not prejudice the plaintiff, I shall be inclined to grant him a continuance.

Chief Judge. If the action had been originally commenced in this Court, I should not be for admitting the confession of the maker of the note to be heard in evidence, but I consider that the defendant, who put the plaintiff upon proof of the partnership, has, by the trial at the lower Court, had access to the note declared upon, discovered who was the subscribing witness, and had sufficient time to inquire whether his appearance on the stand would benefit him. If he considered his testimony material in his defence, he should have summoned him to appear.

I am therefore for admitting the evidence of the confession of *Hyde* to the making of the note.

Evidence admitted.

Cephas Smith, Junior, and *John Cook*, for plaintiff.

Smith & Prentice and *Chauncey Langdon*, for defendant.

ANDREW BARNARD, Appellee,
against
LEMUEL CRANE, Appellant.

ACTION on the case, with a special and several general counts in the declaration. At last term the defendant pleaded *non assumpsit*. Issue joined and put to the Jury, who returned the following special verdict:

An action will not lie to recover back money or chattels advanced upon a contract *nudum in se*.

Rutland County, Supreme Court of Judicature, *February* term, A. D. 1802.

Special verdict.

Andrew Barnard, Appellee,
v.
Lemuel Crane, Appellant.

In this cause the Jury do find, that the said *Andrew Barnard*, at *Hebron*, in the State of *New-York*, on the 24th day of *February*, A. D. 1800, did sell and deliver to the said *Lemuel Crane* the said span of colts, the said watch, and the said forty dollars in money, mentioned in the declaration, at an estimated value, to wit, the said watch at 25 dollars, the said span of colts at 60 dollars, and the said forty dollars at the same sum of 40 dollars; for which the said *Andrew Barnard* agreed to receive of the said *Lemuel Crane*, and the said *Lemuel Crane* undertook and promised to pay the said *Andrew Barnard*, a sum by

Barnard v. Crane.

and beyond the just value of the said money and goods, in money, to wit, 50 dollars for said watch, 120 dollars for said span of colts, and 80 dollars for said 40 dollars; which said last mentioned money, so to be paid for said money and goods by the said *Lemuel Crane* to the said *Andrew Barnard* as aforesaid, was understood to be base and of less value than the common standard, but would, as was pretended, pass current without discovery of its baseness.

And the Jury do further find, that the said watch, colts and forty dollars in money, on the said sale and delivery thereof to the said *Lemuel Crane*, were left in the possession of the said *Lemuel Crane*, and the said *Lemuel Crane* then and there undertook and promised the said *Andrew Barnard*, that if he did not pay to the said *Andrew Barnard* the said sum of 250 dollars, agreeably to the aforesaid contract, that then and in that case, he the said *Andrew Barnard* should receive back the said span of colts, the said watch, and the said forty dollars in money, which should remain at his the said *Lemuel's* house until he the said *Andrew* should receive his said money agreeably to the aforesaid contract.

And the Jury do further find, that the said *Lemuel Crane* did not fulfil said contract by paying to the said *Andrew Barnard* the said sum of two hundred and fifty dollars, and that the said *Lemuel Crane* did not return the said span of colts, the said watch, or the said forty dollars in money, or any part thereof, to the said *Andrew Barnard*, but immediately after the making the said contract, the said *Lemuel Crane* did secrete the said span of colts, the said watch, and the said forty dollars in money, and keep them out of

the hands and knowledge of the said *Andrew Barnard.*

Now the Jury refer and subject their verdict on the issue put to them to the determination of the Honourable Court upon the law arising from the above facts; that is to say,

If the Court are of opinion that the contract, as above stated and found, is a contract valid in law and binding upon the said *Lemuel Crane*, then the Jury upon their oath do say, that the defendant did assume and promise in manner and form as the plaintiff in his declaration hath alleged, and find for the plaintiff the sum of 140 dollars for his damages, and his costs.

But if the Court are of opinion, that the said contract, as above stated and found, is not a contract valid in law, and is not binding upon the said *Lemuel Crane*, then the Jury upon their oath do say, that the defendant did not assume and promise in manner and form as the plaintiff in his declaration hath alleged, and find for him his costs.

Elias Post, Foreman.

At this term the special verdict was argued and decided.

A question was made who should open.

John Cook, for the plaintiff. We had conceived it to be our right to proceed in the argument. The plaintiff has always the priority to the Court or Jury, excepting upon a plea in bar. We should not contend, but considering this to be our right, as counsel for the plaintiff, we had prepared our arguments accordingly, and had agreed that I should go forward

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and open the cause. A different arrangement certainly would operate a surprise, if not an embarrassment.

Samuel Walker, for the defendant. We had considered it to be our right to proceed. *We object* to the plaintiff's right of action, and the objector always has precedence. However, as Mr. *Chipman*, who is with me, intimates that it is a matter of no importance with him who addresses the Court first, and as it appears my learned brother has wasted the midnight oil in preparing an argument calculated *solely to go forward*, and unhappily so unwieldy that it will not go any other way; in the exercise of that courtesy which ought ever to be the characteristic of our profession, especially in the presence of this Court, we shall permit him to proceed.

We had however hoped to have been indulged with an intimation from the Court whose the right is.

It is a general practice for the plaintiff's counsel to proceed in the argument upon a special verdict.

Per Curiam. It has generally been the practice for the plaintiff's counsel to proceed in the argument upon a special verdict.

Cook. That the Court may rule the special verdict in our favour, we shall rely on the following positions, which will embrace and refute every objection which can be made by the defendant's counsel.

First. That the whole facts found by the Jury shew an *executory* and not *a contract executed.*

Secondly. That the contract, as stated in the verdict, is a contract made in the State of *New-York*,

and that our statute does not attach itself to this contract.

Thirdly. That if there are general counts and special counts in a declaration, the plaintiff may, if he fails in proving his special count, prove his general counts, and recover under them.

In support of the first position, we observe, that the contract found by the verdict is,

That the plaintiff delivered to the defendant sundry chattels at an estimated price, and was to receive therefor double the amount in base money.

The defendant appears to be one of those swindlers which have of late infested the country, and the plaintiff one of those simple ones who has been duped by him.

The justice of the cause will incline the Court to decide in favour of the plaintiff. A contrary decision will go to encourage the swindler, and to support and protect him in his unrighteous gains.

If the cause is decided against us, it cannot be upon principles of justice simply considered, but upon those considerations of public policy, under the influence of which Courts of Law are often obliged to trench on the common requirements of justice, to turn a deaf ear to the cries of an injured suitor, and to sacrifice individual interest to the general good.

Hence the maxim, that *ex maleficio non oritur contractus, et in pari delicto potior est conditio defendentis;* upon which we imagine principal reliance will be had by our opponents. But in the application of this maxim of juridical policy, a distinction is made between contracts *executed*, and contracts *executory*.

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If an illegal contract be executed, the plaintiff cannot recover; for *tunc potior est conditio defendentis.* But in a contract executory, if illegal, the plaintiff may recover; for the contract not being perfected in contemplation of law, the consideration is done away, and the illegality of the contract does not attach itself to the action brought for the value of the property advanced.

In the present case, the contract being merely executory, the plaintiff does not go to recover for the breach of the illegal contract, but for the value of his property in the hands of the defendant; not for the base money, but for the watch, horses, and current money, eloigned by the defendant.

This position, that the contract was merely executory, will answer our purpose to take our client out of the general rule above recited. We might indeed go further, and shew, from the case of *Wilkinson* v. *Kitchen*, 1 Ld. *Raym.* p. 89. in the case of the *Newgate* solicitor, that money received upon illegal contract may be recovered back, though the contract *had been completely executed.* But we shall only insist on the distinction between contracts executory and those executed.

In the case of *Lacaussade* v. *White*, tried before Lord *Kenyon* at *Nisi Prius*, *Espinasse's Reports of Cases at Nisi Prius*, vol. 2. p. 630, 631. and afterwards, on motion to set aside the verdict decided in the Court of King's Bench, *Durnf. & East*, p. 535. we find this distinction fully recognised. The declaration in this case stated, that in consideration that the plaintiff had, on the 11th day of *January*, in the year of our Lord 1797, paid the defendant the sum

Day's edit. p. 629, 630.

of 100*l.* he agreed to pay to the plaintiff the sum of 300*l.* if articles forming the basis of a peace, and signed by official characters, by which hostilities would cease and would not recommence, were not settled between *England* and *France*, on or before the 11th of *September*, 1797. Plea of *non assumpsit*. *Gibbs*, counsel for the defendant, acknowledged this to be an illegal transaction, and quoted the maxim, *in pari delicto potior est conditio defendentis;* but insisted that the contract had been executed and the wager lost. He conceded, that if *it had been executory* the plaintiff might have recovered back his money, and said the point was so decided in the case of *Lowry* v. *Bourdieu*, *Doug.* 467. and there was a verdict for the plaintiff for the 100*l.* with liberty for the defendant to move to set it aside, and have a nonsuit entered.

In the Court of King's Bench, on the argument upon this motion, the Court refused the rule. *Gibbs* took the same distinction between cases of this sort where the contract was executed and where it was executory, and admitted, that where the wager is illegal either party may recover back his deposit so long as the contract remains *executory*. But the Court said it was more consonant to the principles of sound policy and justice, that where money has been paid upon an illegal consideration, it may be recovered back again by the party who has thus improperly paid it, than by denying the remedy to give effect to the illegal contract, and referred to the case of *Cotton* v. *Thurland*, 5 *Durnf.* & *East*, p. 405. and though it will appear that this case, which we shall read, was decided upon another point, yet the dis-

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tinction between contracts executory and executed, it is evident, was considered by all the learned counsel to be sound, although the Bench had no occasion to express an opinion upon it; for it is evident in that case, as is too common in our own Courts, the *English* gentlemen of the bar insisted very zealously and argued very profoundly upon points which the Bench considered of no importance in the decision of the cause.

But a question will arise, whether the present parties are *in pari delicto*.

In the case of *Clark* v. *Shee and Johnson*, reported by *Cowper*, p. 200. Lord *Mansfield* observed, that there are two sorts of prohibitions enacted by positive law in respect of contracts:

First. To protect *weak* or necessitous men from being overreached, defrauded or oppressed. There the rule, *in pari delicto potior est conditio defendentis*, does not hold, and an action will lie, because, where the defendant imposes upon the plaintiff, it is not *par delictum*.

His Lordship instances the case of *Smith* v. *Bromley, coram* Lord *Mansfield*, 1760. *Bull. N. P.* 132. This is a mistake in the page; it should be 138. The case in *Buller* is, that the plaintiff's brother being a bankrupt, an agent for one of the creditors told her, that for money his client would sign the certificate. She gave 40*l*. The certificate was signed. She brought *assumpsit*, and recovered.

We may add the case of a usurious contract. The usury may be recovered back, because the defendant is not *par delictum*. He who pays the usury is oppressed, and the law makes an allowance for the pres-

sure of his circumstances, and to deny the borrower redress would be to sanction the illegal contract of the usurer.

In the present case it is obvious, that the State is infested by a horde of villains whose business is to prey upon the weak and the credulous; men who bring with them from elder countries an adroitness in the crooked arts of circumvention which is an over-match for the simplicity of our infant state of society. By one of these our client has been imposed upon. It is true the verdict says that the money he was to receive was to be base; and it is obvious, from the sum proposed to be paid by the defendant, compared with the estimated value of the chattels delivered by the plaintiff, it was so. But this does not conclude that our client so considered it. *That* plausible lubricious language, which could entice our client to a contract of this nature, might easily blind him to the true value of the money. It is true it is difficult to conceive how the plaintiff could so view it. But who shall set bounds to the weakness and credulity of man? Does not every day present instances of equal credulity in men far superior in sagacity to our client? Who is there that has not some time in his life been egregiously duped. Even the learned world has its dupes, and philosophers are persuaded to credit the marvellous and impossible, while men of common minds and common acquirements wonder at their credulity.

Shall it be said then, that these parties are *in pari delicto?* that cunning and simplicity are on par?

The question now is, and it is a question of magnitude, whether it is good policy to apply the maxim

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of *in pari delicto*, &c. to cases of this sort, in our present state of society; whether the Court, by deciding against the plaintiff, will in effect confirm these deceptive contracts, and suffer the swindler to triumph in his unjust gains, or whether they will consider the plaintiff as a weak and oppressed man, and by deciding in his favour break the net of the fowler and set the captive free, and teach these cunning marauders on society, that they must be brought to a strict account for their crooked practices, and be obliged to disgorge their prey. This is a question of policy; and if it has been thought proper to deny men redress in the Courts of Law on the failure of an illegal contract in certain cases, on account of the operation it might have on society, it is well deserving of consideration what will be the effect in our state of society, to suffer the swindler to be protected by law in the possession of the property swindled; for we can see no distinction in effect between protecting the swindler *collaterally*, or by solemn decision affirming his right to prosecute his base contracts.

But if the parties should be considered *in pari delicto*, and the distinction we have taken between contracts executory and contracts executed, is not sound or is inapplicable to this case, it will bring us to the consideration of our second position.

Vermont Stat. vol. 1. p. 342.

That the verdict finds the contract to have been made in the State of *New-York*. This takes it out of our statute against swindling, and of our statute against passing counterfeited money.

It does not appear that there is any statute against crimes of this kind in the State of *New-York*, and the commission of them is certainly no crime at com-

mon law. But if there are any such statutes in that State, an illegal act done contrary to the laws, and within another State, is not to be drawn into question here.

By the Court. The Court do not incline to hear this point argued. There is an existing statute in the State of *New-York* against passing counterfeited coins, passed 7th of *February*, 1788. If no such statute existed, we presume it would have been considered there as a crime at common law. The passing base money *knowingly* carries fraud of the basest kind upon the face of it. It is against good morals, which are the basis of the common law. An act illegal and fraudulent by the common law carries with it its turpitude whenever it is brought into view of a Court of Justice.

Cook. We shall then proceed to establish our third position.

That if there are general counts and a special count in a declaration, the plaintiff may, if he fails of maintaining his special count, safely rely on his general counts.

In the case of *Clark* v. *Shee and Johnson*, already read, there was a special count and several money counts. In speaking of these general counts, upon the point whether the plaintiff could maintain this action upon them, Lord *Mansfield* observed, that the general *indebitatus assumpsit* is a liberal action in the nature of a bill in equity; and if under the circumstances of the case it appears that the defendant can-

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not in conscience retain what is the subject matter of it, the plaintiff may and will support this action.

Let the inquiry in the present case be, can the defendant in good conscience retain the property received from the plaintiff?

In the case of *Lacaussade* v. *White*, already cited, there was a special count, setting forth the wager. The declaration also contained the common money counts. On the trial at *Nisi Prius*, upon the opening of the case, Lord *Kenyon* asked the plaintiff's counsel if the wager in question was not of the description of those which could not support an action as being contrary to the policy of the state.

Garrow, for the plaintiff, admitted the force of his Lordship's objection, that the special count could not be maintained, but contended that he could recover the 100*l.* paid by him in the count for money had and received; and the plaintiff had a verdict on the money counts, which was afterwards affirmed in the King's Bench.

In the present case we contend that the special count will lie; but if we are incorrect, the general counts will support a decision in our favour, on the facts found by the special verdict; for our action is not brought, as in the case of *Lacaussade* and *White*, to enforce an illegal contract, but merely to recover back property advanced upon a mere executory contract; and this reminds me of an observation I had intended to have made, that where a contract is ever so illegal, while it is merely executory or *in transitu*, either party may rescind the contract, and have his action to recover back the property which he may have advanced in the course of the traffic. We find

this doctrine laid down in the case of *Cotton* v. *Thurland*. Our client, by instituting the present suit, has given plenary evidence of his rescinding the contract, which was only executory.

We therefore, on all these points, rest assured of a decision in our favour.

Daniel Chipman, contra. The contract upon which the action is founded, as disclosed by the special verdict, is, that the watch, horses, &c. delivered by the plaintiff to the defendant, were to be paid for by the latter to double the amount of their estimated value in counterfeit money. What follows in the verdict is mere surplusage.

The question is, can this contract be enforced? or on its failure can the money or property advanced be recovered back?

If we had no authorities to guide, and no axioms of the *English* jurists to enlighten us, we should all see that there is something wrong in the very idea of a Court of Justice enforcing an immoral contract.

If two burglers, after having robbed a house, should disagree as to the division of the spoil, and one should bring his action against the other to recover his share of the booty, the entire voice of community would be against sustaining such action. It may be said this is a strong case. True: but the maxims of the *English* law, *ex dolo malo non oritur actio, et ex maleficio non oritur contractus, et in pari delicto potior est conditio defendentis aut possidentis,* cover the present case equally with that I have put.

It is said a distinction is made between an illegal contract executory or executed; that in the former

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ease an action will lie to recover back property advanced on an illegal contract, and therefore this is an exception to the general rules; and yet in the case of *Tompkins* v. *Barnet*, 1 *Salk.* p. 22. the contracts appear to have been executory, but the Court ruled, that the action would not lie; and *Treby*, Chief Justice, observed, that where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but where one knowingly pays money upon an illegal consideration, the party that recovers it ought to be punished for his defence, and the party who pays it is *particeps criminis*, and there is no reason he should have his money again, for he parted with it freely, and *volenti non fit injuria*.

The intent and application of this principle is clearly expressed by Lord *Mansfield* in delivering his opinion in the case of *Holman et al.* v. *Johnson, alias Newland*, in *Cowper's Reports*, p. 343.

" The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice, as between him and the plaintiff, by accident, if I may so say. The principle of policy is this, *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa*, or the trans-

gression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

The question in this case is the same with that now under consideration. Is the plaintiff's demand founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country.

Can there exist a doubt that the plaintiff's action is grounded upon an immoral act? that he entered into an illegal contract, expressly prohibited by the statute law of this State? If he had received the base coin which he contracted to receive, would it not have been highly criminal in him if he had passed it to others? and this must have been his design in contracting for it. Would it not have exposed him to infamous punishment.

If the contract is founded upon an immoral act, or upon the ground of doing any thing prohibited by positive law, it is of no importance whether executory or executed. Here the contract was both *malum prohibitum* and *malum in se.* Therefore the cases cited by the gentleman opposing do not apply.

The case of *Lacaussade* v. *White,* in which a verdict was taken for the plaintiff, and affirmed in the Court of King's Bench, exhibits a contract neither

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malum prohibitum or *in se*. It was a wager about a peace between *England* and *France*, and Lord *Kenyon* declared, that it turned on a matter of public policy. And here the question was properly made, whether the contract was executory or executed; for his Lordship expressly declared, that if the contract was *malum in se*, the money could not be recovered back.

It is said that the plaintiff is not *par delictum*. It is true, that in contracts made in breach of certain penal statutes, which give a penalty against only one of the contracting parties, both are not considered *in pari delicto;* as in case of usury, and in case of money advanced by the relation of a bankrupt, extorted by a creditor for signing the bankrupt's certificate, *Doug.* 697. and the case of *Jacques* v. *Golightly*, 2 *Black. Rep.* 1073. where the plaintiff brought his action to recover back premiums advanced by him for insuring lottery tickets; and so in *Jacques* v. *Withy*, 1 *H. Black.* 65. Here the parties were not *in pari delicto.* The penal statutes had distinguished the criminal by subjecting him only to the penalty, and considered the other party as oppressed or overreached, and the acts were merely *mala prohibita;* but where the act or contract is *malum in se*, the parties are both considered *in pari delicto*, and the maxim applies with force, *ex dolo malo non oritur actio.*

Of the case of the *Newgate* solicitor, cited from Lord *Raymond*, we have but a short note, and doubts may arise whether the case is correctly reported. It certainly is not much relied upon in subsequent cases of the same nature.

It is said, if the verdict cannot be decided in favour of the plaintiff upon the special it may on the money counts. But it remains to be shewn, that the principles we have advanced do not apply to the entire declaration.

It is said, that an illegal contract may be rescinded while *in transitu*. But when did the plaintiff rescind? When he despaired of receiving the base money. Is this repentance or disappointment?

The only question which can be made in this cause, is, whether, in our state of society, it will be most eligible, as a principle of public policy, to adhere to the maxim which requires all suitors to come into Court with clean hands, or to abandon it, and have our Courts descend from the dignified bench of morals and justice, to hear and adjust the immoral claims of the profligate; whether it is preferable to teach our citizens to beware criminal contracts by letting them know, that if they are duped by their companions in vice, they must look for no redress from the laws of their country, or to assure them that they may safely enter into the most criminal contracts; for though they have been violating the laws, and plotting against the honest part of community, yet, if they fail in their villanous designs, the law, with a view to punish their accomplices, will give them as ample recompense as if they had been honest and injured.

How this question ought to be determined I have no doubt, and I believe the Court have none.

Walker, in addition, merely read the case of *Walker* v. *Page*, 3 *Burr.* p. 1568.

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Cephas Smith, Junior, in reply. We have neither inclination or occasion to contest the maxim, *in pari delicto potior est conditio defendentis;* but we consider our case not to be within it.

It appears, where the contract is executory the maxim does not apply.

We have shewn a case where the illegal contract was even *executed*, and the money was recovered back; but it is said there is but a short note of this case from Lord *Raymond's* Reports, and that the case has been lightly esteemed in subsequent decisions.

As to the brevity of the case, there is sufficient reported to shew both its nature and the principle which governed its decision; and so far from this case having been lightly esteemed in more recent decisions, in the case of *Cotton* v. *Thurland*, tried in the King's Bench, 1793, Judge *Grose*, in giving his opinion, declared expressly, that though he had subscribed to an adverse decision determined at *Nisi Prius* by *Wilson*, Justice, yet he was governed in this case by the case cited from Lord *Raymond*, (which it appears was this same case of *Wilkinson* v. *Kitchen*,) and by *Buller's Nisi Prius*, which we have also read in the opening.

Whilst the case of *Tompkins* v. *Barnet*, cited by Mr. *Chipman* from 1 *Salk.* is reprobated by Lord *Mansfield* in the case of *Clark* v. *Shee and Johnson*. His Lordship's words are, "The case of *Tompkins* v. *Barnet* has been long exploded. In *Bosanquet* v. *Dashwood*, Lord *Hardwicke* and Lord *Talbot* both declared their disapprobation of it." Lord *Mansfield*

also said, "that case had been denied a thousand times."

The principle is, that where an illegal contract is entered into, while it is executory either party may rescind it, and maintain an action to recover back the money or property advanced upon it.

This seems to be a principle borrowed from the divine law: when a man sins against the law of his country, he shall have a time for repentance and amendment. A man may hastily, thoughtlessly, or ignorantly infringe the law, and upon reflection wish to rectify his error. The law encourages such wholesome resolutions, and allows him a term to carry them into effect, to wit, from the time of entering into the contract until it is completely executed.

But it is said that there is no time allowed for rescinding a contract *malum in se*. But the contract *malum in se* and a contract *malum prohibitum* are put upon the same footing in the books, and no good reason can be shewn why a man may not rescind one as well as the other. If the contract be immoral, the contractor has a greater obligation, and the law ought to hold out as great an inducement, and give as liberal an opportunity for him to repent and rescind it, as if the contract was merely prohibited by the statute law.

It is said the plaintiff did not rescind until disappointed of receiving the base money. The plaintiff's motives to rescind the contract, are not now to be inquired into. The law looks in these cases to a man's acts, not to his motives. The law has pointed out his day of grace, to wit, while the contract is *in transitu*, and he has rescinded within this term.

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We consider with the gentleman, that the great question in the present case is, to what extent the maxim, *ex maleficio non oritur contractus, et in pari delicto potior est conditio defendentis*, shall be applied in our state of society. Protesting, however, that our client is not *par delictum* with the defendant; for we find numerous cases in the books where the contractors to an illegal contract, even immorally illegal, as in the case cited by Sir *Bartholomew Showers*, in the case of *Wilkinson* v. *Kitchen*, where a bribe was given to a custom-house officer, are not considered *in pari delicto*.

The principle seems to be, that where one of the parties to an illegal contract is oppressed or overreached, the law makes an allowance for human frailty, and lends its aid to protect him who is thus oppressed or overreached, provided he rescinds the illegal contract before it is fully executed.

To bring this home to our own state of society. It is obvious a horde of swindlers are daily employed in overreaching the ignorant and credulous, by sometimes advancing, but oftener promising to give them money, which they have the address to persuade simple people is as good as current coin, and thus enticing them to part with the acquirement of their honest industry, to the great and frequent impoverishment of their families. The Legislature have passed an especial act against such nefarious and ruinous practices; but it has not cured the evil, and we consider and trust, that the Court will consider, that the last, best, and only measure to be adopted to check such pernicious practices, is to force such swindlers to refund their ill-gotten gains.

Let then the maxim of the common law be preserved in full force as a general rule, but suffer the plaintiff's case to be an exception to it, considering the decision as grounded on the present state of society, and the peculiar circumstances of the imposition practised upon him.

Judgment for the defendant, and costs. The Chief Judge dissenting.

Cephas Smith, Junior, and *John Cook*, for the plaintiff.

Daniel Chipman and *Samuel Walker*, for the defendant.

REGULÆ GENERALES.

Supreme Court of Judicature, Addison County, August Term, A. D. 1790.

IT is ordered by the Court, that after the present circuit, all actions cognisable before this Court shall be entered on the first day of the sitting of the Court, and not after.

By order of Court,

N. BRUSH, Clerk.

Note. In the practice under this rule, a party is allowed to enter on any other day with special leave of the Court, who will see that the adverse party is not prejudiced; as in the case of *Bennet* v. *Whitney.*

Supreme Court of Judicature, Chittenden County, August Term, A. D. 1791.

IT is ordered by the Court, that all causes brought to this Court by appeal from any County Court, shall be heard, tried and determined upon the pleadings in the Court below, unless one of the parties in the Court below shall think he has missed his plea, replication, rejoinder, &c. in which case the party so missing his plea, replication, rejoinder, &c. shall have li-

berty to alter or amend the same, or plead *de novo* as the case may be, on giving to the adverse party notice in writing of such alteration, amendment, or new plea, &c. at the time of granting such appeal, or not less than thirty days before the Court to which such appeal shall be entered.

Provided nevertheless, on the first or second day of the Court sitting, that upon motion and sufficient cause, the party who shall have missed his plea, replication, rejoinder, &c. and not given notice as aforesaid, shall have liberty to alter or amend or plead *de novo*, by paying down to the adverse party such reasonable costs as the Court shall award for such neglect.

By order of Court,

N. BRUSH, Clerk.

Supreme Court of Judicature, Orange County, September Term, A. D. 1791.

IT is ordered by the Court, that on the entry of every writ of error, the plaintiff in error shall deliver to the Court a fair copy of the writ of error, with the assignment of the errors.

And whenever an issue of law is joined on special pleadings in any cause, the party demurring shall in like manner furnish the Court with a fair copy of all the pleadings in the cause, on his filing his demurrer.

By order of Court,

N. BRUSH, Clerk.

Note. In the practice upon the second member of this rule, the term " pleadings" is considered in a more extensive sense than what is strictly technical, and is construed to include not merely those matters which come after the declaration, but the party demurring is always obliged also to furnish a copy of the declaration, and even of the writ and service, whenever they may be any wise drawn into question in the arguments upon the demurrer.

Supreme Court of Judicature, Chittenden County, August Term, A. D. 1793.

IT is ordered by the Court, that after the present circuit, all motions for the continuance of causes shall be made on the first day of the sitting of the Court, founded on affidavit in writing of the person or persons in whose favour the motion is made, or his attorney; which affidavit shall be lodged with the Clerk of our Court.

By order of Court,
N. BRUSH, Clerk.

Note. Practice under this rule: If the cause for a continuance arises after the first day of the term, or was not known to the party at that time, it has been considered to take him out of the rule, and he may file his affidavit and motion afterwards.

Supreme Court of Judicature, Bennington County, February Term, A. D. 1802.

IT is ordered by the Court, that the Clerk shall not enter any action upon the docket of the Court until the appellant or appellants shall have produced attested copies of all the files and records appertaining to said action, agreeably to the statute; and in all suits originally returnable to the Court, until the original process be delivered into his office, unless by special direction of the Court.

IT is ordered by the Court, that on the first day of every stated term, the Clerk shall exhibit to the Court, for their inspection, complete records of the proceedings thereof regularly made up to the time of such exhibition.

IT is ordered by the Court, that in all processes returnable to the Court, where an order has been made by the Court or either of the Judges for the publication of the same in any public newspaper; upon such order being submitted to the Clerk, with the doings of the party thereon, it shall be the duty of the Clerk to inspect the proceedings as to such publication, and the Clerk's certificate that he has thus inspected such proceedings, and that the same are in pursuance of such order, shall be received by the Court as *prima facie* evidence that such order has been complied with, and the Clerk shall receive twenty-five cents as a fee for such inspection and cer-

tificate, to be paid by the party procuring the same to be done.

IT is ordered by the Court, that there shall be paid to the Clerk for his use, fifty cents, as a fee for his filing and safe keeping each affidavit in each motion in arrest of judgment, motion or petition for a new trial, or for the obtaining a continuance in any action.

By order of Court,

SAMUEL ROBINSON, Second Clerk.

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Action.

See Conspiracy.

An action of *indebitatus assumpsit* will not lie to recover the interest accruing upon a judgment debt during the suspension of the execution by the creditor. Nor can the plaintiff shew an express promise to pay such interest under a general count. *Beedle* v. *Grant and Darling.* 433

If a credit given is voluntary, subsequent to, and making no part of the original contract, it may at any time be retracted. But if it make any part of the original contract, it is so material a part of it, that if *an action* be brought within the time limited for the credit, it cannot legally be supported unless it was not a *bona fide* purchase by the vendee. *Fisher* v. *Brown.* 405

Debt on recognisance entered by private informer, upon motion and order for new bail to prosecute a complaint before a Justice holding a Court of Inquiry, will not lie. *Hazen et ux.* v. *Smith and Caswell.* 105

See Trustees.

General *indebitatus assumpsit* for work and labour done will not lie upon a promise made by the defendant to pay for the work, &c. done under the contract of another, though the work, &c. was done upon the defendant's buildings, and for his eventual benefit. *Sherman* v. *Stanton.* 350

But if there is a count in the same declaration for money had and received, and verdict for the plaintiff, the Court will not on motion set it aside, if it appears that substantial justice had been done between the parties. Id. ib.

An action for deceit will not lie against a purchaser who makes false affirmations in his own favour in order to obtain a day of payment *Fisher* v. *Brown.* 387

An action will not lie to recover back money or chattels advanced upon a contract *malum in se.* *Barnard* v. *Crane.* 457

An action founded on tort may be sustained against one or more defendants; and if two defendants join in pleading the general issue, and the Jury find one guilty and exculpate the other, this will be no cause for setting aside the verdict. *Wright* v. *Cooper and Tousey.* 425

Administrator.

See Insolvent Estate.

The administrator of an insolvent estate may shew the intestate's insanity in evidence in avoidance of his contract. *Lazell* v. *Pinnick and Matson, Adm'rs of Gilman.* 247

See Freehold.

Advertisement.

See Proprietor's Taxes.

Amendment.

In a declaration upon a libel, if the plaintiff declares *quæ sequitur in his verbis*, the minutest variance between the libel offered in evidence and the declaration will be fatal. But if this exception is taken on trial to the Jury, the Court will on motion order a declaration amended *instanter* upon payment of costs. *Harris* v. *Lawrence et al.* 156

After judgment on *special demurrer*, the Court will on motion order the declaration amended on payment of costs. *Austin* v. *Dills.* 311

Appellant.

Allowed to enter his appeal on the *third day* of the term, being retarded by the rigour of the season. *Bennet* v. *Whitney.* 59

Attachment.

When an officer attaches a chattel and leaves it in the custody of the debtor, he so far loses his lien upon the property attached, that a second attachment or *bona fide* purchase shall always enure against him. *Pomroy* v. *Kingsley.* 294

Attendance.

See Travels.

Attorney.

The State Attorney's prerogative of entering a *nolle prosequi* is suspended while the person charged is on trial. He cannot then enter without leave of the Court. *State* v. *I. S. S.* 178

When the name of an attorney of the Court appears on the record, the Court will not suffer the record to be controverted. *Coit et al.* v. *Sheldon.* 304

If a party has been injured by the appearance of counsel not retained, he may have his remedy. Id. ib.

Audita querela.

In issuing a writ of *audita querela*, the Judge taking the recognisance must make record of the same; but it is sufficient that he minutes on the writ, "that *A. B.* &c. recognised to the defendant in the sum of —— dollars, to prosecute the above writ in due form of law, before," &c. *Taft* v. *Tharp's Ex'rs.* 291

Auditors.

When three auditors have been appointed by the Court to audit the book accounts of parties, and report is made by two of them, the Court will admit parol testimony to shew that the parties agreed to proceed before the two in the absence of the third auditor, and will accept their report. *Booth* v. *Towsey.* 407

B

Bail.

Plaintiff may enter himself as bail for costs of prosecution on the original process in civil suits. *Adams* v. *Davis.* 3

The sheriff shall at his own risk take such bail for prisoners admitted to the liberties of the gaol yard, as in case of escape shall be sufficient to satisfy a judgment in favour of the creditor *in money*. *Udall* v. *Rice.* 213

In action on the case against the sheriff for taking insufficient bail, a *non est* returned by the sheriff's deputy on the execution which issued upon the *sci. fa.* against the bail may be so far impeached as that the sheriff may shew in his defence under the general issue, that the

bail was of sufficient property to respond the judgment at the day of the date of such execution. *Sherwood* v. *Pearl.* 314

Upon the surrender of the principal by his bail on mesne process in a Justice's Court, the magistrate can order him into the custody of a proper officer. If none such be present he can appoint one, who may detain him upon the parol order of the magistrate, whilst the Justice's Court continues open; but the officer cannot justify detaining his prisoner one moment after the Court is adjourned with or without day, unless he has a mittimus from the justice. *Abells* v. *Chipman.* 377

Bail-bond.

A promise made by a sheriff to a debtor within the liberties of the prison, "that if he escaped he would not sue him until he had prosecuted the bail," will not operate a defeasance of the bail-bond, if the principal be sued at the same time with the bail. *Rice* v. *Pollard et al.* 230

Bar.

See *Qui tam.*

In a plea in bar to debt on a foreign judgment, it is necessary to aver that the judgment was recovered contrary to the *lex loci.* *Waddams* v. *Burnham.* 233

See Bond.

A promissory note, dated 6th *November*, 1787, barred in six years, under the act of the 10th of *March*, 1787, taken in connection with the act of the 28th of *October*, 1790. *Bailey* v. *Russell.* 334

Betterments.

Objections to a declaration for betterments cannot be taken in opposition to the filing, but must be made in the common course of pleading to such declaration. *Bingham, ex dem. Barlow and Bradley,* v. *Smith.* 287

Bond.

If a bond be executed jointly and severally by three, and alteration is made in it by the consent of two of the obligors in the absence of the third, and afterwards the seal and signature of the third be erased by the obligee or his agent, without the consent of the others, the bond is void. *Dewey* v. *Bradbury.* 186

The surreptitious antedating of a bond may be well pleaded in bar. *Davis* v. *Cole and Mansfield.* 262

Book Account.

In action upon promissory note, the defendant having paid in discharge of the note sundry articles of merchandise, the common subject of charge on book, is not obliged to file his book account, under the 93d section of the judiciary act, but may shew such payment under the general issue. *Pierce* v. *Clark.* 140

C

Comparison of hand-writing.

Comparison of hand-writings, or concession of a party on a former trial, when not attached to the record, cannot be given in evidence whilst the subscribing witness to a contract is within process. *Pearl* v. *Allen.* 4

Complaint.

On complaint for the non-entry of a writ of error, the interest must be computed from the date of the execution on the original judgment. *Bellamy* v. *Corban.* 372

When the appellant is defaulted, the appellee cannot file a complaint as in case of non-entry by the appellant, and thus recover 12 per cent. interest as increase of damages, but must take his debt and usual costs in the action appealed. *Pearse* v. *Goddard.* 375

Confession.

The record of a voluntary confession before a Justice, and payment of the whole penalty, may be pleaded in bar to an action *qui tam.* *Hamilton* v. *Williams.* 15

Conspiracy.

Combination to entice a citizen within a foreign jurisdiction for the purpose of

procuring him to be arrested in civil process is a tionable, though the debt for which he is arrested is justly due. *Phelps* v. *Goddard and Hitchcock.* 60

Conveyance.

See Deed.

Costs.

See Travel. Ejectment.

Upon the granting of a new trial, grounded on the discovery of material evidence, the Court will not tax costs against the adverse party from the commencement of the suit, but merely those costs which have accrued after granting the new trial. *Hogg, ex dem. Hodges et al.* v. *Wolcott.* 141

See Amendment. Libel.

As a general rule, the Court will not in error judge over the County Courts in the taxation of costs. *Harmon* v. *Broome and Son.* 415

County Court.

See Jurisdiction.

County Courts not empowered to compel a party under a general rule to appear and answer to a new declaration filed on affidavit after the files have been lost. *Kinne* v. *Plumb.* 20

Covenants.

The deed of a *feme covert* must be executed and acknowledged conformably to the statutes of the state, or certified agreeably to the laws of the kingdom, &c. in which it is executed. If not, the covenants in such deed are not binding on the feme after the decease of her husband. *Sumner* v. *Wentworth.* 42

D

Decision.

Decisions under various tax acts. To wit,
Under the surveyor-general's *Biddlecom* v. *Farwell* 5
Under the 30,000 dollar tax. *Doe, ex dem. Mix,* v. *Whitlock.* 305
Under the ten shilling tax. *Doe* v. *Strong.* 192
Under the *Stockbridge* proprietors' tax. *Wentworth* v. *Allen.* 226
Under the *Fairfield* ditto. *Powell* v. *Brown.* 185
To render valid a sale of land under the act for raising 30,000 dollars, passed *November* 3d, 1791, an attested copy of the rate-bill or general list made by the selectmen, and delivered to the constable of any incorporated town, must be shewn to have been deposited with the State Treasurer by the 1st of *November,* 1793. *Doe, ex dem. Mix,* v. *Whitlock.* 305
The general list must ascertain all the lands in such town held in severalty, and the number of acres contained in each lot, and the range in which it lies, and the division to which it was drawn or pitched, and the tax to be paid on the same. Id. ib.
Decision under the act establishing the division of lands in the town of *Shoreham. Doe, ex dem. Forbes,* v. *Smith and Barnum.* 38

Declaration.

See *Scire facias.*

Objections to a declaration for betterments cannot be made in opposition to the filing, but must be made in the common course of pleading to such declaration. *Bingham* v. *Smith.* 287

Deeds.

The deed of a *feme covert* conveying land held in her own right must be executed and acknowledged conformably to the *lex loci* where the land lies. *Harmon* v. *Tuft and Cogswell.* 6

See Covenants.

Where the deed is not merely the inducement but the foundation of the action, or where the right of action is not created by operation of law, but by the act of the party, the obligation, or any other instrument embracing a contract, must be proferted in the declaration. *Austin* v. *Dille.* 308

When a party declares in substance upon a written contract, he is not obliged to set forth the express words of the contract in his declaration. *Morton* v. *Wells.* 382

In an action of deceit in a contract, some special damage ought to be alleged in the declaration. *Fisher* v. *Brown.* 405

If a declaration contains a count within the jurisdiction of the Court, it will not vitiate it, because the plaintiff has added a second count, exclusively within the jurisdiction of a single magistrate. *Cook* v. *Porter.* 450

On trial to the Jury, the Court will on motion order the declaration amended on payment of costs. *Harris* v. *Lawrence et al.* 162

Default.

A default entered on the docket is not conclusive until after the rising of the Court. *Pearse* v. *Goddard.* 376

Deposition.

If the deponent is personally present in Court, his deposition cannot be read. *Doe, ex dem. Sergeant,* v. *Adams.* 197

It is no objection to the caption of a deposition, that the *attorney* of the adverse party was not notified, though living within thirty miles of the place of caption. *Heacock* v *Stoddard.* 344

It is not a connection in a party's family by intermarriage with his daughter, but an interest in the cause, which incapacitates a person from writing or drawing up a deposition. Id. ib.

A deposition illegally taken cannot be read after the deponent's decease, upon the principle that it is the best evidence which can now be produced. *Johnson* v. *Clark.* 449

E

Entry.

See Appellant.

Ejectment.

It is a general rule that travel and attendance shall be taxed for all the defendants in ejectment. *Boynton* v. *King and Barnard.* 30

Nominal plaintiff in ejectment cannot maintain an action against the sheriff for an escape of defendant committed on an execution in his name for the damages recovered and costs taxed in the action of ejectment. *Chipman* v. *Sawyer.* 83

When he who has the fee of land allows anotherto erect buildings upon it under a contract that when the buildings are completed he will either pay for them or convey the land at his election, ejectment will lie upon ouster of the architec. And if a creditor of him who owns the fee levies an execution on the land, and does not include the buildings in the appraisement, ejectment will lie by the creditor of the architec who has levied an execution on any section of the buildings. *King* v. *Catlin.* 355

See Mesne Profits.

Evidence.

See Comparison of hand-writing. Concession of a party at a former trial. Slander. Bail. Referees. Warrant. Creditor.

A woman divorced *a vinculo matrimonii* is a competent witness upon an indictment against her former baron for a forgery committed during coverture. *State* v. *J. N. B.* 36

In case upon a written contract, it may be read in evidence to the Jury if it substantially comports with the declaration. *Farnum et al.* v. *Barnum et al.* 72

Where a privity is shewn between several defendants in trespass, the acts of any one of them may be exhibited in evidence in proof of the trespass. *Broughton* v. *Ward and Wolcott.* 137

The original files of the County Court, with the Clerk's certificate of the judgment accompanying them, permitted to be read in evidence. *Allis* v. *Beadle.* 179

When the plaintiff declares upon a special contract, and has other counts for money had and received, and work and labour done, in his declaration, if the special count on demurrer is ruled insufficient, on *non assumpsit* pleaded to the general counts, he may not give the special con-

tract in evidence under the general counts. *Culver* v. *Burnet.* 182
An administrator of an insane intestate may shew the intestate's insanity in evidence in avoidance of his contract. *Lazell* v. *Pinnick and Matson.* 247
The deed of a collector of a proprietor's tax, however it may be worded, is not even *prima facie* evidence of a legal sale of land. The proceedings of the proprietors in the assessment of the tax, and the collector's own acts in the levy of it must be first shewn. *Powell* v. *Brown.* 285
The warrant warning the meeting of the proprietors must be shewn, that the Court may be enabled to judge whether it issued agreeably to law. Id. 286
If a contract in writing mentions a sum in dollars and cents, the Court will permit it to be shewn in evidence that the sum was to be paid in *United States* bank bills, this going not to controvert but to explain the contract. *Morton* v. *Wells.* 382
A plaintiff cannot shew an express promise to pay the interest accruing upon a judgment debt during the suspension of the execution by the creditor under a general count. *Beedle* v. *Grant and Darling.* 433
In an action brought against a surviving partner upon a promissory note alleged to have been signed by the deceased partner in his life-time in the name of the firm, proof of his confession that he signed it admitted in evidence. *Adams* v. *Brownson.* 452

Execution.

An officer is empowered to set off one execution against another between the same parties, and both in his hands at the same time. *Culver* v. *Pearl.* 12
Sheriff having two writs of execution for and against the same parties, may extend upon the same parcel of land, with specifying in his return distinct boundaries. *Doe, ex dem. Baldwin and Booth,* v. *Foot et al.* 14

F

Fees.

An officer cannot tax fees for the return of an execution stayed by *supersedeas* in a writ of error. *Peck* v. *Stanton.* 28
Where several trustees personally attend, separate travel and attendance may be taxed. *Porter* v. *Russel and Hodges.* 35
It is a general rule, that travel and attendance shall be taxed, for all the defendants in ejectment. *Boynton* v. *King and Barnard.* 30

Freehold Court.

Proceedings respecting it.

Upon complaint brought upon the 6th section of the act to prevent forcible entry and detainer, it is not necessary that the magistrate issuing the process should enter on the complaint a minute of the time of its exhibition. *Allen, Adm'r of Allen,* v. *G. and J. Ormsby.* 345
Upon trial at the Supreme Court, upon appeal from a Freehold Court, the Petit Juror's oath in civil causes must be administered to the Jury. Id. 347
On complaint by an administrator, under the act to prevent forcible entry and detainer, the plaintiff shall not be estopped from shewing possession in the intestate because he has omitted to inventory the lands in question in his return of the real estate of the intestate to the registry of probate. Id. 348

G

Governor's Rights.

The late Governor of *New-Hampshire's* rights of land reserved to him by the charters, are considered as not held in common with the other proprietors. *Doe, ex dem. Wentworth,* v. *Strong.* 196

H

Habeas Corpus.

A writ of protection *ad testificandum* suspends all civil process against the subject of it while coming to and attending upon Court, with a reasonable time for the witness to return home after the rising of the Court. *Ex parte Hall.* 274

I

Indictment.

Indictment for sending a written challenge to fight a duel will not lie upon the 21st section of the act for the punishment of certain inferior crimes and misdemeanors, passed *March* 4th, 1797. *State* v. *S. S.* 180

On trial upon an indictment for perjury in swearing falsely to a deposition, the facts stated in the deposition appeared to be true, but the deponent, after making the deposition, testified upon the stand that they were not true, the prisoner was not estopped by his *viva voce* testimony from shewing the verity of the facts stated in the deposition in his defence. *State* v. *J. B.* 269

Indictment for perjury quashed on motion. *State* v. *J. P.* 283

Every sufficient indictment must set forth the day, month and year, and in cases of burglary the hour when the offence was committed, and though another day may be shewn in evidence on trial, yet it must be a day within the term prescribed by the statute of limitations, and the day set forth in the indictment must be also some day within the statute time, or the indictment will be insufficient. *State* v. *G. S.* 295

Insolvent Estate.

If the administrator upon an estate represented insolvent, brings an action, the defendant shall not be estopped from pleading counter demands in set-off because he has exhibited those demands before the commissioners, whether such demands have been allowed or disallowed. *Olcott, Adm'r of Olcott,* v. *Morey.* 198

J

Jurisdiction.

In civil causes, when the demand is above 7 dollars and under 33 dollars in unliquidated, and 52 dollars in liquidated demands, County Courts and Justices of the Peace have concurrent jurisdiction. *Young* v. *Sanders.* 8

County Courts' jurisdiction in this instance done away by statute. Id. 9

Jurors.

If a Juror is qualified by being a freeholder when put into the box, his divesting himself of his freehold before drawn and summoned cannot be taken advantage of after verdict, but should have been objected in challenge. *Orcutt, ex dem. Warner,* v. *Carpenter.* 250

If a Petit Juror by any intimation discloses the event of the verdict before it is delivered in Court, it will be considered a gross violation of his official oath, and the verdict will on motion be set aside. Id. 252

Upon trial at the Supreme Court, on appeal from a Freehold Court, the Petit Juror's oath in civil causes must be administered to the Jury. *Allen, Adm'r of Allen,* v. *G. and J. Ormsby.* 347

L

Lease.

A lease by the husband during coverture of lands held in right of his wife, of which she had been endowed in consequence of a prior marriage, cannot enure against the woman after a divorce *a vinculo matrimonii,* but may be considered *sub modo* so far as to secure the baron's tenant in his emblements upon the determination of the lease by the divorce. *Gould* v. *Webster.* 409

Libel.

In a declaration for a libel, if the plaintiff declares *quæ sequitur in his verbis, scilicet,* the minutest variance between the libel offered in evidence, and the declaration, will be fatal. *Harris* v. *Lawrence et al.* 156

In action upon a libel, if plaintiff recover above seven dollars in the County Court, and defendant appeals and plaintiff recovers in the Supreme Court under seven dollars, he shall tax no more costs than damages. Id. 164

M

Mesne Profits.

In the hearing of damages upon a default in ejectment, brought to recover possession of lands holden by the levy of an execution, the mesne profits are to be computed from the date of the levy of the execution, and not from the expiration of the six months allowed by the statute for the debtor to redeem. *Little* v. *J. and P. Meachum.* 439

Miscellaneous.

On a rule to shew cause, the Court will not order an attorney of the Court to deliver to the State Attorney, for the inspection of the fraud, any promissory notes suggested to have been forged, which had been delivered to the attorney in the common course of business by his client, suspected of committing a forgery. *State* v. *Squires.* 147

N

Nolle prosequi.

The State Attorney's prerogative of entering a *nolle prosequi* to an indictment is suspended while the person charged is on trial. He cannot then enter without leave of the Court, who will not grant it if the defence appears to be ample. *State* v. *I. S. S.* 178

Notice.

If the subject matter of a statute notice under the general issue could not be pleaded in bar, such matter may be avoided on trial to the Jury, by parol demurrer to the evidence. *Rice* v. *Pollard et al.* 232

The Court will not *on trial* order a party to produce *instanter* a written instrument under the 57th section of the judiciary act; there must be due notice. *Hastings* v. *Powers.* 272

O

Overt Market.

What sales shall be considered to have been made in overt market in this State. *Heacock* v. *Walker.* 341

P

Pleadings.

The Court will not award a repleader after judgment upon a material issue. *Page* v. *Walker.* 145

See Insolvent Estate.

If the subject matter of a statute notice under the general issue could not have been pleaded in bar, such matter may be avoided on trial to the Jury by parol demurrer to the evidence offered in support of it. *Rice* v. *Pollard et al.* 230

To plead several distinct facts, all tending to one defence, is no departure in pleading. *Waddams* v. *Burnham.* 233

In a plea in bar to a debt on a foreign judgment, it is necessary to aver, that the judgment was recovered contrary to the *lex loci.* Id. ib.

Practice.

It is the practice for the counsel of the plaintiff to proceed in the argument upon a special verdict.

Procedendo.

Motion for writ of. 335

Process.

A deputy sheriff, an inhabitant of a town, is not disqualified from serving a process by *summons* in favour of the corporation. *Selectmen of Windsor* v. *Jacob.* 241

In an action on the case against the sheriff for taking insufficient bail upon mesne process, the defendant is by the plaintiff

made so far privy to the judgment against the bail, that he may in his defence take advantage of a radical defect in the process in the *sci. fa.* *Sherwood* v. *Pearl.* 320

Promissory Note.

A promissory note deposited with arbitrators, subject to their indorsement, to the amount of their award, is void. *Drake* v. *Collins.* 79

Proprietors' Taxes.

The collector of a proprietor's tax is not obliged, in his advertisement for sale, to annex to the name of each delinquent proprietor such sum as is assessed on his right or share, but may mention the amount of the tax on each right *generally*, and then insert a list of the names of the delinquents. *Wentworth* v. *Allen.* 226

The deed of a collector of a proprietor's tax, however it may be worded, is not even *prima facie* evidence of a legal sale of the land The proceedings of the proprietors in the assessment of the tax, and the collector's own acts in the levy of it, must be first shewn. *Powell* v *Brown.* 285

The warrant warning the meeting of the proprietors must be shewn, that the Court may be enabled to judge whether it issued agreeably to law. Id. 286

Q

Qui tam.

The record of a voluntary confession before a Justice, and payment of the whole penalty, may be pleaded in bar to an action *qui tam.* *Hamilton, qui tam,* v. *Williams.* 15

R

Rate-bill.

See Decisions.

The rate-bill necessary to be produced to maintain a title under the 30,000 dollar tax. *Mix* v. *Whitlock.* 30

Reception.

A person loaning a horse, which is eloigned and sold by the borrower, has a right to recapture, provided it be done without breach of the peace. *Heacock* v. *Walker.* 338

A person may recapture his own property in such manner as may constitute a trespass. Id. 342

Recognisance.

See Action.

Upon a recognisance to prosecute a writ of error taken under the statute of 1791, where, upon nonsuit and complaint, execution has issued for 12 per cent. interest and costs, and has been returned satisfied, although the original execution is not purchased out, the Court will chancer the penalty to a sum merely nominal. *James* v. *Smith.* 128

The extra expense in procuring witnesses and employing counsel, the time spent and money necessarily expended in defending a suit, *aside of the fee-bill*, are not comprehended in the term "intervening damages," inserted in the recognisance for a review. *Peasely* v. *Buckminster.* 264

In issuing a writ of *audita querela*, the Judge taking the recognisance must make record of the same; but it is sufficient that he minutes on such writ, "that *A B.* &c. recognised to the defendant in the sum of — dollars, to prosecute the above writ to effect, before," &c. *Taft* v. *Tharp's Executors.* 291

Referees.

Upon objection to the acceptance of the report of referees, the Court will only hear evidence relative to corruption in the referees, or misconduct in their not following the rule, either by neglecting to notify or hear the parties, or their taking into consideration matters not submitted to them. *Webber* v *Ives.* 441

V

Verdict.

If a Petit Juror by any intimation discloses the event of the verdict before it is delivered in Court, it will be considered a gross violation of his official duty, and the verdict on motion will be set aside. *Orcutt* v. *Carpenter*. 252

It will be no cause for setting aside a verdict, that two defendants in a proper action of tort joined in pleading the general issue, and the Jury found one guilty and exculpated the other. *Wright* v. *Cooper and Tousey*. 425

W

Warrant.

A warrant to apprehend a person charged with a crime upon the complaint of a private informer, cannot legally issue without oath made by the complainant, though the complaint and the *capias* recite it was under oath, yet nothing short of the magistrate's certificate can be sufficient evidence that the oath was administered. *State* v. *J. H.* 444

Witness.

See Evidence.

In trover for a chattel loaned by the plaintiff to his son, and eloigned from the youth by a swindling contract, the son is inadmissible as a witness on the part of the plaintiff. *Pierce* v. *Hindsdall*. 153

On an indictment for forgery under the 18th section of the act for the punishment of certain capital and other high crimes and misdemeanors, the promisor of a note found by the Grand Jury to have been forged, cannot be admitted as a witness. *State* v. *A. W.* 260

Writ of Protection.

A writ of protection *ad testificandum* suspends all civil process against the subject of it, while coming to and attending upon Court, with a reasonable time for the witness to return home after the rising of the Court. *Ex parte Hall*.. 274

Writ of Sci. fa.

See Sci. fa.

END OF VOLUME I.

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